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- *By the Students*
- *Of the Students*
- *For the Students*

## 6TH SEMESTER COPYRIGHT NOTES

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## **LAW OF COPYRIGHT**

**Q. Discuss the Nature and Object of Copyright Law. Write a brief note on the various features of copyright law in India.**

The objective of copyright is to promote the public good by encouraging and fostering cultural and scientific activity. Copyright protects cultural works, the creative expression of thoughts and feelings.

These works are in a variety of forms, art works, music, novels and poetry. They are the expression of a culture – its heritage, which is built on by each generation adding their own perspective to the existing culture, which will enrich the lives of generations to come.

To demonstrate its importance to culture and society, copyright is recognised as one of the Human Rights in the Universal Declaration of Human Rights. Consequently, the value and benefits associated with copyright and the systems which support it cannot be underestimated.

Many countries are now using copyright to protect valuable indigenous cultures, ensuring their vibrant and individual national cultural expression continues.

The existences of strong and enforceable copyright laws are also a necessary precursor to participation in the global economic community, bringing particular benefits to the economies of developing countries.

The internet and lower costs of communication means that copyright works can be made available more easily, enabling improvements in the education system and skills development within communities.

It is for these reasons that creators, copyright owners and governments need to understand the key aspects of the copyright system, including its strengths and limitations.

Copyright protection comprises both economic and moral rights. While these key aspects of copyright system have their rationales in two very different approaches to copyright - one as an economic driver and the other as an author's right – their combination or synthesis in many economies allows copyright development to become an important tool to develop and enhance the cultural industries.

### **Three Pillars of the Copyright System**

There are three pillars of an effective copyright system – legislation, enforcement and management.

**(a) Legislation:** *International Copyright Conventions* Consistency in copyright law between different countries is maintained through international treaties. These treaties set out the basic standards of copyright protection. Each country that chooses to become part of the system then develops national laws based on those standards of copyright protection.

The minimum standards of copyright protection are contained in the Berne Convention, which was developed in 1886. There are currently 164 national signatories to the Berne Convention.

The Berne Convention standards are incorporated into later international treaties, such as the 1994 World Trade Organisation's Trade Related Aspects of Intellectual Property Rights Agreement (TRIPS), and the World Intellectual Property Organisation's Copyright and Performers and Phonograms Treaties of 1996.

**National Legislation:** It is the role of national legislators to translate the terms of the international treaties into national law and adapt the terms of the treaties to the particular legal system operating in each country. An overriding consideration is that the national legislation must be in harmony with the norms of the international convention. However, within these parameters it is open to the national legislators to provide exceptions to copyright and to establish the systems necessary for the collective management of copyright.

**(b) Enforcement of Copyright:** By enforcement I mean the ability of copyright owners to enforce their rights, through the legal system and also through administrative systems, such as customs. Enforcement is supported by raising public awareness of copyright issues, and by more specific training of judicial and policing staff in relation to copyright.

This means that those systems, as well as the legislative system should be reviewed and adapted to ensure that they adequately manage the copyright industries and the trade in copyright goods.

A critical element in establishing effective enforcement systems is education – education of those in society generally to understand the importance of copyright and of participants in those systems to understand the special features of the copyright industries.

**(c) Management of Copyright:** The last important element of a functioning copyright system, is the management of rights. Copyright can be managed individually or collectively.

The circumstances where collective administration is preferable to individual administration are typically when there are:

Large numbers of low value uses of copyright material;

A potentially large pool of users in a wide geographic area.

In these mass usage situations, collective management of copyright either through a statutory or a voluntary licence can be a solution for both the copyright users and copyright owners.

In relation to individual management of rights, other legal aspects, such as laws relating to contracts, and the judicial system need to be fully functional. A key element of the management of copyright is education and communication. For example, authors and publishers must be educated about their rights, and the best means of managing them and of course, the community needs to be educated about their rights and obligations, as copyright users.

### **COPYRIGHT ACT**

In real sense of the term the first 'independent' statute of India was the Copyright Act of 1957 which kick started the modern copyright law in conformity with the Berne and the Universal Copyright Convention. The Act is both a substantive as well as procedural in nature and provided for legal remedies to enforce the right. Thus, it can be drawn that any country wishing to stimulate or inspire its own authors, composers or artists, and thus augment its cultural heritage, must provide for effective copyright protection.

On the first hand, it gives the definition of words to be understood in copyright parlance such as an 'author' would not be merely an author of a literary piece for the purposes of copyright but an author, as understood in copyright parlance is one who is the creator of the work. Similarly other terms such as 'reproduction', 'artistic work', 'work', 'reprography' etc. has been ascertained a definite connotation and scope, to be understood within the parameters of copyright coinage. It further defines the various categories of copyrighted works and spells out the. exclusive rights which constitute copyright in such different categories of copyrighted works, including term of copyright, such as literary, dramatic work, artistic work, sound recording etc.

India is a member of the Berne Convention and the United Copyright Convention. The Copyright Act 1957 conforms to these two conventions but both the conventions were revised at Paris in the year 1971 enabling developing countries to grant compulsory licences for translation and reproductions of works of foreign origin, required for the purpose of research or teaching or for the purposes of systematic instructional activities, if these rights could not be obtained on freely negotiated terms and conditions enabling their publications or ensuring their availability at prices reasonable in their context, the object of the international community shall not be feasible. In pursuance of the international development the amendments of Indian Copyright law was also effected in order to avail these benefits. Provisions are also made for publication of unpublished works where the author is either dead or unknown, as the owner of the copyright cannot be traced. Further, the Copyright Board has been empowered to decide disputes arising out of such assignment which may extend to permitting the author to withdraw from the assignment. Broadcasting authorities are now permitted to translate foreign works for broadcasting for the purpose of systematic instrumental activities. Provisions have also been made for copyright in lectures, address etc. delivered in public and for the publication of the entries made in copyright register.

### **CHARACTERISTICS OF COPYRIGHT**

Copyright is not a single right rather it is collection of rights. Following are the characteristic features of copy right.

1. **Creation of a statute:** Copyright is formation of a particular statute under the present law. This law is applicable only on work which are as per the provision of this act i.e.any work can not qualify for copyright.
2. **Some Form of intellectual property:** A copyright is a form of intellectual property because it protects the product of a human mind.
3. **Monopoly right:** Copyright is monopolistic in nature. It restricts others from using the rights of a copyright owner.
4. **Negative right:** Copyright is a negative right it stops others from copying the work protected under copyright.
5. **Object of copyright:** The basic aim of copyright law is to motivate authors, composers and artists to create original works by giving them exclusive right for a specified period of time.
6. **Multiple rights:** Copyright is not a single right. It consists of a collection of different rights in the same work. For example, a literary work copyright includes the right issuing copies of work, translation of work etc.

7. **Neighbouring rights:** Copyright Act explains broadcasters' and performers' rights, they are known as "neighbouring rights". They were created for performing artists, producers of phonogrammes, and people involved in broadcasting (radio or television).

**Q. Do you think copyright is a negative right? Justify your answer with various examples.**

Copyright is sometimes called a "negative right", as it serves to prohibit certain people (e.g., readers, viewers, or listeners, and primarily publishers and would be publishers) from doing something they would otherwise be able to do, rather than permitting people (e.g., authors) to do something they would otherwise be unable to do. In this way it is similar to the unregistered design right in English law and European law. The rights of the copyright holder also permit him/her to not use or exploit their copyright, for some or all of the term.

Copyright law is a negative right, which prevents the copying of physical material existing in the field of literature and arts. The exclusive right is a negative right, which is a right granted to the authors by preventing others not to copy or reproduce his work without permission. The right is granted with a view of preventing others to avail themselves of the work of others unfairly. Its object is to protect the writer and the artist from the unlawful reproduction or exploitation of his material. This negative right also extends by preventing others without the consent or licence of the author to exercise any other form of right attached to copyright. For e.g. any conversion into a cinematograph or adaptation into a musical work of any literary work needs permission to do so.

"Copyright law is concerned in essence with the negative right of preventing the copying material. It is not concerned with the reproduction of ideas, but with the reproduction of the form in which ideas are expressed. Ideas it has always been admitted are free as air. A copyright is not a monopoly unlike patents and registered designs, which are. Thus if it can be shown that two precisely similar works were in fact produced wholly independently of one another, there can be no infringement of copyright by one of the other. The position is that, if the ideas embodied in the plaintiffs works is sufficiently general; the mere taking of that idea will not infringe. If however, the idea is worked out in some detail in the plaintiffs work and the defendant reproduces the expression of that idea, then there may be an infringement. In such a case it is not the idea which has been copied but its detailed expression."

**Q. What do mean by "originality" in Copyright Act ?**

As per Section 13 of the Indian Copyright Act, copyright subsists in dramatic, artistic, musical works as well as cinematographic films and sound recordings. The Copyright Act as such does not define the term "*originality*" but the Indian courts have relied on various doctrines laid down by the foreign courts.

The Privy Council, in the case **Macmillan & Company Ltd. v. J.K. Cooper, (1924) 26 BOMLR 292**, which laid down that copyright over a work arises and subsists in that work due to the *skill and labour spent* on that work, rather than due to inventive thought. This is more popularly known as the '**sweat of the brow**' theory. It has been held that originality derives merely from the fact that sufficient labour, skill, capital and effort (whether physical or otherwise) has been applied in the work. This "*sweat of the brow*" theory was adopted in India, as evidenced from the Delhi High Court judgment in the case of **Burlington Home Shopping v. Rajnish Chibber 61 (1995) DLT 6**, wherein it was held that a compilation may be considered a copyrightable work by virtue of the fact that there was devotion of time, labour and skill in creating the said compilation from many available works.

In the case of ***Feists Publication Vs Rural Telephone Services***, 499 U.S. 340 (1991) the court introduced another concept for determining originality namely ***minimum modicum of creativity*** wherein it has been held that it must be independently created by the author and that it possesses at least some minimal degree of creativity in it to make it eligible for attaining originality. As per the judgment any independent creation with certain degree of creativity would be considered as original.

The Indian Supreme Court, in its landmark judgment of ***Eastern Book Company v. D.B. Modak***, ***Eastern Book Company v. D. B. Modak***, AIR 2008 SC 809 departed from both these approaches and established the standard of originality that fell midway between 'sweat of the brow' and 'minimum modicum of creativity'. In doing so, the Indian Supreme Court was followed the reasoning given by the Canadian Supreme Court in ***CCH Canadian Ltd. v. Law Society of Upper Canada***, [2004] 1 SCR 339,. But in practice, this midway standard is extremely difficult to practice and implement. According to this midway standard, an 'original' must be a "*product of an exercise of skill and judgment*", where 'skill' is "*the use of one's knowledge, developed aptitude or practised ability in producing the work*" and 'judgment' is "*the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work*". As per the Canadian Supreme Court, this exercise of skill and judgment must not be "so trivial that it could be characterized as a purely mechanical exercise" and must be "*more than a mere copy of another work*." At the same time, "*creativity is not required*" to make the work 'original'. It is thus evident that a great deal of ambiguity exists around the practical implementation of this standard.

**Q. Discuss the importance of International Conventions in protecting Copyright in India. Write a note on "TRIPS Agreement".**

Generally copyright protection which protects the original (that a sufficient amount of labour, judgement, capital and skill has been expended by the author) creative expression of an idea begins automatically from the date of creation, usually without being subject to any formalities as specified Article 5(2) of the Berne Convention, where "the enjoyment and the exercise of these rights shall not be subject to any formality." "Copyright does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression," L.J, ***Hollinrake v. Trustwell***, (1894) 2 Ch. 420.

Article 9(1) of the TRIPS Agreement stipulates that members shall comply with ***Article 1 to 21 of Berne Convention*** with the exception of ***Article 6 bis*** and the Appendix as provided. *Droit a la paternite* and *droit au respect de loeuvre* are recognized under ***Section 57 of the Indian Copyright Act (1957)*** and survive even after the assignment of the copyright, either wholly or partially with exception to computer programmes. Under the Berne Convention broadly, the exclusive rights of 'making or authorizing' granted to authors of artistic and literary works under the Convention include the right of translation (***Article 8 Berne Convention***), the right of reproduction in any manner or form, which includes any sound or visual recording (***Article 9 Berne Convention***), the right to authorize the performance of their dramatic, dramatico-musical and musical works through public performances by any means or process, the public communication of these performances and their rights of translation, (***Article 11 Berne Convention***) the right to broadcast and communicate to the public, by wire, rebroadcasting or loudspeaker or any other analogous instrument, the broadcast of the work (***Article 11 bis Berne Convention***), the right of public recitation by any means or process, any public communication of the recitation of their work and their rights of translation (***Article 11 ter Berne Convention***), the right to make adaptations, arrangements or other alterations of their work (***Article 12 Berne Convention***) and the right to make cinematographic adaptations and reproductions of their work, the performance and communication by wire of these adaptations or reproductions. (***Article 14 Berne***

**Convention)** Copyright of works first made or published in a country or the author of which was, at the date of such publication, a national of a country who is Member of the Berne Convention for the Protection of Literary and Artistic Works, or Universal Copyright Convention or World Trade Organization, are protected in India as if they are Indian works, based on **section 40 of the Indian Copyright Act, 1957** read with International Copyright Order, 1999. Accordingly all provisions of the Indian Copyright Act, 1957 will apply as if they are Indian works. Copyright is a statutory creation and registration is not mandatory under the Indian Copyright Act, 1957. It consists of a bundle of rights which rights can be assigned or licensed either as a whole or separately. **Section 13** of the Indian legislation provides that copyrights shall subsist throughout India [given, in the case of published work, it is first published in India or the author is a citizen of India at the date of publication or at the time of his death *and* in the case of unpublished work the author at the date of making the work a citizen or domiciliary of India] in original literary, dramatic, musical and artistic works, cinematograph films *except* if a substantial part of it is an infringement of a copyright in another work and a sound recordings *except* where in making the sound recording a copyright in a literary, dramatic or musical work is infringed. The copyright in a cinematograph film or a sound recording shall not affect the separate copyright in any work in respect of which or a substantial part of which, the film or the sound recording is made. Section 14 of the Indian legislation provides that copyright in case of a literary, dramatic, or musical work and largely in the case of artistic works or a substantial part thereof, means the right *to do* or *authorize* the reproduction of the work in any material form including the storing of it in any medium by electronic means, to issue copies of, to perform or communicate the work to the public, to make any cinematograph film or sound recording in respect of the work, to make any translation of the work, to make any adaptation of the work, or do any of the above in relation to a translation or an adaptation of the work. In the case of cinematograph film the right extends to making a copy of the film, including a photograph of any image forming a part thereof, the right to sell or give on hire or offer for sale or hire, any copy of the film and the right to communicate the film to the public. The rental right provided in the case of cinematographic works digress from Article 11 of the Agreement as the latter excludes cases “where the rental right has led to widespread copying which materially implores the exclusive rights of reproduction.” In the case of sound recordings the right extends to making another sound recording embodying the former, to sell or give on hire, or offer for sale or hire, any copy of the sound recording and to communicate the sound recording to the public.

The TRIPS Agreement provides protection to “computer programmes whether in source or object code protected as *literary works* under the Berne Convention.” Computer databases are protected under **Article 10(2)47** where “such protection shall not extend to the data or material itself and shall be without prejudice to any copyright subsisting in the data or material itself.” These provisions reinforce **Article 2(5) of the Berne Convention**. Also, under the Agreement rental rights are provided to authors and their successors in title to either authorize or prohibit the commercial rental of originals or copies of their copyright works in computer programmes, where the computer programme is the essential object of rental. [Article 10(1), TRIPS] This rental rights is enforced in India under **Section 14 (b)(ii)**. Under **Section 14 (b)(i) of the Indian Copyright Act 1957**, copyright with respect to the computer programmes or a substantial part thereof means the exclusive right *to do* or *authorize*, the reproduction of the work in any material form including the storing of it in any medium by electronic means, to issue copies of, to perform or communicate the work to the public, to make any cinematograph film or sound recording in respect of the work, to make any translation of the work, to make any adaptation of the work, or do any of the above in relation to a translation or an adaptation of the work. Courts in India have recognized collection of databases in electronic format and protected them under the Copyright Act in **Burlington home shopping Pvt. Ltd. v. Rajnish Chibber and Anr, 1996 Patent and Trade Mark Reporter, 40 (Delhi High Court)**. Further exceptions to copyrights are provided under **Section 52 (aa), (ab), (ac) and (ad)** which entail the making of copies or adaptation of a computer programme by the lawful possessor to make back-up copies purely as a temporary protection against loss, destruction or damage in order to utilise the computer programme for the purposes for which it was

supplied, the doing of an act necessary to obtain information essential for operating inter-operability of an independently created computer programme with other programmes provided that such information is not otherwise readily available, the observation, study or test of functioning of the computer programme in order to determine the ideas and principles which underline any elements of the programme while performing such acts necessary for the functions for which the computer programme was supplied and the making of copies or adaptation of the computer programme from a personally legally obtained copy for non-commercial personal use.

Article 13 of the Agreement provides limitations and exceptions to rights granted under exceptional cases which do not conflict with the normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the right holder. This provision mirrors **Article 9(2) of the Berne Convention**. Other exceptions provided to copyrights are under Article 10 (quotations and use of work by way of illustration for teaching purposes), **Article 10bis** (reproduction of newspapers or similar articles and use of work for purposes of reporting current events). Compulsory Licenses are granted under **Articles 11bis(2), 53 and 13(1)** (possible limitations of the rights of recording of musical works and any words pertaining thereto). Limitations and exceptions to the exclusive rights are contained in **Section 31** (compulsory licenses), **31 A** (compulsory licenses in unpublished Indian works), **32** (license to produce and publish translations), **57 32 A and 52 of the Copyright Act, 1957**. **Section 39** deals with exceptions relating to broadcast reproduction right and performers' right. These exceptions and limitations are for special cases and without prejudice to the normal exploitation of rights by right holders and do not unreasonably prejudice the legitimate rights of the author. **Section 52 of the Copyrights Act (1957)** provides exceptions to infringement under **Section 51** under (i) fair dealing (**sections 52(1)(a) and (b)**) and (ii) allowances for reproduction. The term fair dealing is not defined in the act and is a question of fact and impression where the court will take into consideration the quantum and value of the matter taken in relation to the comments or criticism, the purpose for which it was taken, whether the work is published or unpublished and the likelihood of competition between the two works. The basic purpose of fair dealing which applies as a defence only to literary, dramatic, musical or artistic works is to protect the freedom of expression under **Article 19(1)** of the Indian Constitution.

Copyrighted work (other than photographic work or applied art) calculated on a basis of "other than life of natural person" shall not subsist for less than 50 years from end of calendar year of its authorized publication or else within 50 years of making the work or 50 years from the end of the calendar year of making. Under Berne the term is life of author plus 50 years. **Articles 7(2) and (3)** provide that the term of protection for cinematographic and anonymous or pseudonymous work expires 50 years after work becomes lawfully available to the public. In the case of photographs and applied art it spans to at least the end of 25 years from making the work. Under **Section 22 of the Indian Copyrights Act (1957)**, the term of protection extends until sixty years from the beginning of the calendar year following the year in which the author dies in the case of literary, dramatic, musical or artistic works (excluding photographs) published within the life of the author. A term of sixty years shall apply for anonymous and pseudonymous works in the case of literary, dramatic, musical or artistic works and for posthumous works in the case of literary, dramatic, musical works or engravings and for photographs and cinematographic film and for records from the beginning of the calendar year following the year in which the work (or photograph) is first published under **Sections 23, 24, 25, 26 and 27** respectively.

### **TRIPS AGREEMENT**

The TRIPS Agreement is the most comprehensive and extensive piece of multilateral agreement on Intellectual Property which came into effect on 1 January 1995. TRIPS is the first WTO agreement requiring Members to corroborate a relatively comprehensive set of substantive norms within their domestic legal systems, requiring them to establish enforcement measures and procedures meeting minimum standards. The TRIPS Agreement deals in a wide range of intellectual property subject matter areas, such as copyright, trademark, patent. Trips also



cover certain areas like competitive markets, enforcement measures, dispute settlement, and transitional arrangements. Members of WTO have the right to implement the TRIPS Agreement in the manner they consider appropriate. Intellectual property ("IP") law contains much inherent flexibility. Members have the *right* to use the flexibility inherent in the Agreement, as well the *obligation* to meet its minimum requirements.

### **The requirements of TRIPS**

TRIPS require member states to provide strong protection for intellectual property rights and lay down various provisions in relation to it.

### **TRIPS on Copyrights and Provisions in Indian Law Unification with The Berne Convention**

It was while the Uruguay Round negotiations, that it came to notice that the Berne Convention already, for the most part, provided adequate basic standards of copyright protection. Consequently, it was observed that the extent of departure should be the existing level of protection under the latest Act, the Paris Act of 1971, of that Convention. The point of departure is expressed in Article 9.1 under which Members are obliged to comply with the substantive provisions of the Paris Act of 1971 of the Berne Convention, i.e. Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto.

Conversely, the members do not have a rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6*bis* of that Convention, i.e. the moral rights (the right to claim authorship and to object to any derogatory action in relation to a work, which would be prejudicial to the author's honour or reputation), or of the rights derived there from.

The provisions of the Berne Convention primarily deal with issues like minimum term of protection, subject-matter to be protected, rights to be conferred and permissible limitations to those rights.

However, the Appendix permits developing countries, under certain conditions, to make some limitations to the right of translation and reproduction. Not restricted to the discussions above, it also requires compliance with the basic standards of the Berne Convention.

**Article 9:1 TRIPS:** The TRIPS fundamental provisions on copyright primarily involve assimilated provisions of the Berne Convention (Articles 1 through 21, and the Appendix). Generally, in case of a dispute, for settlement, a panel or the Appellate Body is called upon for interpretation of the relevant provisions of the Berne Convention within the framework of the TRIPS Agreement.

**Article 9:2 TRIPS:** Copyright protects the interests of *authors* and *artists* in their literary and artistic works and concerns the "expression" of the author or artist, in contrast to such person's "idea". The author may not be able to copyright the subject of writing but certainly can prevent the use by others of a particular way of expressing an idea, such as describing specific individuals or the details in a storyline.

**Article 10.1 TRIPS:** It provides that computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971). This provision confirms that computer programs must be protected under copyright and that those provisions of the Berne Convention that apply to literary works shall be applied also to them. Furthermore, the form in which a program is, be it as a source or object code, does not affect the protection. It also confirms that the general term of protection of 50 years applies to computer programs.

**Article 10.2 TRIPS:** It provides that databases and other compilations of data or other material shall be protected as such under copyright even where the databases include data that as such are not protected under copyright.

The TRIPS provision also provides that the databases have to be protected, whether machine readable or other form. Furthermore, the provision clarifies that such protection shall not extend to the data or material itself, and that it shall be without prejudice to any copyright subsisting in the data or material itself.

**Article 11 TRIPS:** It grants authors the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. With respect to cinematographic works, the exclusive rental right is subject to the so-called impairment test: a Member is excused from the obligation unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title.

**Article 13 TRIPS:** Members are required to confine limitations to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

**Q. Discuss the term of copyright as provided under the copyright act 1957. Explain the concept of 'idea' and 'expression' under the Copyright Act in India.**

Section 14 of the Act defines 'copyright' means an exclusive right to do or authorise the doing of any of the works specified. Copyright is the term to describe the bundle of rights which are granted by statute, for limited periods of time and subject to certain exceptions, in respect of original literary, dramatic, musical or artistic works, such as novels, plays, poems, musical compositions, paintings, sculptures as well as of sound recordings, films broadcasts and typographical arrangements of published editions. These are proprietary rights, giving the owner the right to do or authorise other persons to do the acts restricted by the copyright law. Copyright means the right to copy, specific, a property right in an original work of authorship (including literary, musical, dramatic, choreographic, pictorial, graphic, sculptural, and architectural works; motion pictures and other audiovisual works; and sound recordings) fixed in any tangible medium of expression giving the holder the exclusive right to reproduce adapt, distribute, perform and display the work. "Copyright is a monopoly of limited duration, created and wholly regulated by the legislature and an author has therefore no other title to his published works than that given by statute." "The term means that the right to make copies of a given work- at first it meant simply written work - and to stop others from making copies without one's permission."

**Atari Games Corp. and Tengen Inc. v Nintendo of America Inc., 24 U.S.P.Q 2d 1015 (Fed Cir. 1992)** quoting from the opinion of the *New Kids on the Block v News Am. Publishing* "The copyright holder has a property interest in preventing others from reaping the fruits of his labour, not in preventing the authors and thinkers of the future from making use of, or building upon, his advances. The process of creation is often an incremental one, and advances building on past developments are far more common than radical new concepts. Where the infringement is small in relation to the new work created, the fair user is profiting largely from his creative efforts rather than free-riding on another's work. A prohibition on all copying whatsoever would stifle the free flow of ideas without serving any legitimate interest of the copyright holder." **Sega Enterprises Ltd v Accolade Inc., 24 U.S.P.Q2d 1561 (9th Cir. 1992)**

Copyright is defined as the exclusive right to make copies, licence and exploit a literary musical or artistic work, whether printed, audio, video, etc works generated, such right by law on or after the statute comes into force and are protected for a period of time after his or her death. Copying means an imitation, reproduction or transcript of an original; written matter intended to be reproduced in printed form; to make copy or copies.

Copyright consists of making available multiple rights on the same work normally referred as 'bundle of rights.' In a literary work for e.g. the author can reproduce a hardback or paperback editions, the work may be converted into dramatic and cinematographic versions and it may be used for adaptation, abridgement and translation. A work may also be converted into a play or a musical work which can be performed in public.

The computer software or computer program is considered as a literary work and accepted by almost all the countries. Few countries have also recognised the computer programs under patent law, for e.g. the United States (U.S). Recognition of computer program as literary work has brought in various questions of applicable legal principles of traditional/analog media and adoption of such principles to the digital media and its implication. The researcher intends to study the impact of this technological development and the changes that had to be adopted into the copyright law.

### **IDEA AND EXPRESSION**

It is a traditional copyright doctrine that copyright protects only expressions and not the Ideas behind such expressions. This Idea/Expression Dichotomy is considered as the central axiom by the courts while determining what is protected in infringement cases.

The essence of copyright lies in this very distinction between expressions and unprotected ideas. Many people have raised their contentions to the idea/expression dichotomy, but none of them have tried understanding and identifying the root of this problem. An idea can in no way exist separate from an expression. Either there is a manifestation, or the idea cannot exist. The main reason behind this is that one can only differentiate the form when the idea has been substituted for some form of writing or other kinds of expression that is when the idea of the writer has been equated to such writing/ expression by him. Thus, drawing a difference between idea and expression cannot decide what is protectable under the Law of Copyrights. Rather, the distinction is to be made between the expressions that are protectable and those that are not, under the Copyrights Act, 1976.

### ***IN SIMPLE TERMS, NEITHER CAN "EXPRESSIONLESS IDEA" EXIST, NOR CAN "IDEALESS EXPRESSION"***

The District Court of the Southern District of New York recently gave the summary for the justification of the idea/expression dichotomy: *The idea/expression dichotomy, although an inexact tool, has not been abandoned because any better way for the settlement of the two conflicting interests of the society which make available the basis to grant and limitations on the protection of copyright, both fulfilling individual creativity and nevertheless allowing the growth and developments grounded on the same subject matter by any person, other than the actual author, has not yet been discovered.*

*The dichotomy of idea/expression is now customarily applied to all areas that need protection, including many recent developments like the computer programs.*

### **"Ideas" and "Expressions"**

Ideas are discussed as human mental conceptions or representations. They are not eternal Platonic forms that exist apart from such human conceptions and are waiting to be thought. Thinking is generally viewed as concept manipulation and thus, necessarily involves expressions. Thus, a contrast between ideas and expressions has never been an issue.

The form/ expression does not add something to an idea that is already existing, independently of all the expressions. Also, the idea of writing cannot exist apart from some form/ expression. Thus, ideas are incepted to be expressions themselves, even in their simplest form, they will always be in some of expression. Thus the fact

that “ideas are human conceptions” concludes that the ideas can’t exist apart from the only way of conceptualizing that is “Expression”.

***IDEAS OR POTENTIALLY PROTECTABLE EXPRESSIONS CAN BE DISEMBODIED, BUT THERE CAN’T BE  
EXPRESSIONLESS IDEAS.***

The main difficulty with this dichotomy is that the courts and commentators never define clearly what they mean by “ideas” and “expressions” while relating to them. By only committing to the idea/expression dichotomy, one would just hypothesize the concept.

**Scènes à Faire:** Some of the courts recognize that some of the ideas can be expressed the most efficiently only when certain elements or background is used. This doctrine is referred to as “Scènes à Faire” in French. Thus, in this case, even the expressions are not protected, except in the case of exact copying. For example, the scene of marching of soldiers cannot be preserved, as it would be common in many war related movies.

**The Merger Doctrine:** Where there are only some particular ways in which an idea can be expressed, and there is just a little difference between the idea and expression, then the idea and expression are said to be merged. This doctrine is referred to as the “Merger Doctrine”. When this happens, the limited number of ways to express the idea can’t be protected. The reason behind this is that if these ways are protected, then it would be leading to the protection of an idea, which is not a provision of the Copyright Law. This doctrine means that if things are similar in any way, or even if they are identical, they might not be infringing Copyright.

**Case Laws**

In 1879, the Supreme Court chose in ***Baker v. Selden*** {FN43: 101 U.S. 99 (1879)} that the copyright of a book that portrayed a particular accounting procedure did not ensure the structures necessary to utilize the system.

There is no uncertainty that work on the subject of accounting, though only illustrative of well known structures, may be the question of copyright; but, then, it is claimed only as a book. Such a book may be illustrative either of old structures, or of an totally new system; and, reflected as a book, as the effort of an author, handing over information on the subject of accounting, and consisting of detailed descriptions of the art, it may be a very appreciated achievement to the practical knowledge of the public. But there is a clear difference between the books, as such, and the skill which it is intended to demonstrate. The mere declaration of the scheme is so evident that it needs hardly any argument to support it. The same difference may be established of every other skill as well as that of accounting. A treatise on the structure and use of medications, be they old or fresh; on the manufacture and use of watches, or ploughs, or churns; or on the combination and use of colors for painting or dyeing; or on the manner of drawing lines to yield the effect of perception, would be the subject of copyright; but none would argue that the copyright of the treatise would provide the exclusive right to the skill or manufacture described within it.

In 1954, the Supreme Court reiterated the principle that copyright shields expression, but not functions. In the case ***Mazer v. Stein***, the Court addressed the scope of protection of copyright for a sculpture that shaped the base of a lamp. It was found that copyright shielded the artistic traits of the sculpture, but not the functional traits linked with being the base of a lamp.

Unlike a patent, a copyright provides no particular right to the art revealed; protection is given only to the expression of an idea and not the idea itself. In the case of ***Baker v. Selden***, the Court said that a copyrighted book on a unique system of accounting was not infringed by a comparable book using a similar strategy which

accomplished similar outcomes where the suspected infringer made an unlike arrangement of the columns and used different headings. The difference is exemplified in the case *Fred Fisher, Inc. v. Dillingham*, once the court speaks about the two men, each an expert, individually making maps of the same region. Though the maps are alike, each may attain the exclusive right for making copies of his own particular map, and yet none of them will infringe the other's copyright. Similarly, a copyrighted directory is not infringed by a comparable directory which is the creation of independent work.

The test of whether something is not a protectable idea or a protectable expression is characteristically ad hoc, and organizations of law have been established through court cases for dissimilar types of copyrighted works. But many themes run through most idea-expression explores.

**Q. Discuss concept of "Author" under copyright law. Explain the justification for providing corporate to authors. Discuss the law relating to ownership of copyright.**

The author in copyright history, especially before the Statute of Anne, had been regarded as a separate entity from the printer or publisher of a work. The distinguishable rights of a book owner over the manuscript as a physical object made out of ink and parchment from the rights of an author over the text itself indicated an early separation between the person who created the work and the person who invested in publishing it. In fact, early forms of copyright practiced by the book trade showed more of an economic interest by the book sellers in the physical embodiment of a text rather than the text itself. Printing privileges that were given to printers in the year 1400s allowed books to be printed in large quantities and distributed. This encouraged a capitalistic enterprise in the form of the book trade to develop though not creative endeavors through autonomous authorship. Authors were given separate privileges but it appeared from the privileges granted to authors, editors, translators and printers that even in fifteenth century Venice, a fusion of authorship and the print business existed.

Whereas, Authorship and Ownership have long been closely intertwined in copyright law. Indeed one of the most notable features of statute of Anne, 1710 was that it recognized authors as first owners of the literary property they created. This concept has been repeated in United Kingdom's Copyright Act of 1988 declares that the author of a work is the first owner of copyright. The rule that copyright initially vests in the author is, however, subject to a number of exceptions. The first and most important concerns works made by employees. Exceptions also exist in relation to Crown copyright, parliamentary copyright, and to works created by officers of international organizations.

The provisions of acquiring copyright ownership are defined under Section 17 of the Act. According to which, the first owner of copyright is defined as under:

Subject to the provisions of this Act, the author of a work shall be the owner of copyright therein. Section 17 statutorily recognizes the author of the work to be the first owner of the copyright. The author is defined under the Act for various works, which come under the law of copyright.

Section 2(d) defines author, it says "Author" means, -

- (1) In relation to a literary or dramatic work, the author of the work;
- (2) In relation to a music work, the composer;
- (3) In relation to artistic work other than a photograph, the artist;

- (4) In relation to photograph, the person taking the photograph, the artist;
- (5) In relation to a cinematograph film or sound recording, the producer; and
- (6) In relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created.

However, this provision is subject to certain exceptions.

For instance Section 17 (a) provides that where a work is made by the author in the course of his employment by the proprietor of a newspaper, magazine or a periodical under a contract of service or apprenticeship for the purpose of publication in a newspaper, magazine or periodical, the said proprietor, in the absence of any agreement to the contrary will be the first owner of the copyright in the work in so far as it relates to the publication of the work in any newspaper, magazine or similar periodical or to the publication of the work for the purpose of being so published. Except in such cases, the author will be the first owner of the copyright in the work

Section 17(b) provides that where a photograph is taken or a painting or a portrait drawn, or an engraving or a cinematograph film made, for valuable consideration at the instance of any person, such person, in the absence of any agreement to the contrary, shall, be the first owner of the copyright therein.

Section 17 (c) provides that in the case of work made in course of the author's employment under a contract of service or apprenticeship, to which clause (a) or clause (b) does not apply, the employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright therein. An author may create a work independently, or he may create a work under a contract of service or contract for service.

### **Ownership of Copyright**

Generally, the creator or the author of the work is the owner of the work and therefore entitled to get the copyright for the work. Where the author of the work is employed by another person, the work belongs to the employer of the author. And where creation of the works is incidental, but not the purpose, the work belongs to the authors. But in practice, out of the contractual agreement between the employer and the employee, the creation during the course of employment would be belonging to the employer.

There may be a situation where a particular final work involves many copyrightable sub-divisions such as film wherein many works such as music, lyrics, dramatic works etc are copyrightable. The authors in the creation of such work are many such as:

- a. In the case of a musical work, the composer.
- b. In the case of a cinematograph film, the producer.
- c. In the case of a sound recording, the producer.
- d. In the case of a photograph, the photographer.
- e. In the case of a computer generated work, the person who causes the work to be created.
- f. In the case of Script, the writer. Etc.

Where the work is made by the author in the course of his employment under a contract of service or apprenticeship, for the purpose, the said employer shall, in the absence of any agreement to the contrary, be the first owner of the copyright in the work in so far as the copyright relates to the publication of the work, or to the reproduction of the work for the purpose of its being so published, but in all other respects the author shall be the first owner of the copyright in the work. For example, where the composer of the music copyrights his creation and later provides the same to the film for some consideration, the work is still owned by the author only.

**Ownership Rights:** The owner of the Copyright has the following rights under the Act

### **ECONOMIC RIGHTS**

**REPRODUCTION:** The Copyright confers upon the assessee the sole right to reproduce the authored work. In other words, no other person except the author shall make copies (one or many) of the work or copy the substantial part of the work in any form including sound and film recording etc without the permission of the copyright owner. For example, a person buys a film CD and the person makes multiple copies of it and sells it to others. This would amount to copyright infringement.

**COMMUNICATION:** Communication to the public means making any work available to general public for the purpose of being seen or heard or otherwise enjoyed by the public directly or by any means of display or diffusion. It is not necessary that any member of the public actually sees, hears or otherwise enjoys the work so made available. For example, a cable operator may transmit a cinematograph film, which no member of the public might have seen. Still it is a communication to the public. The fact that the work in question is accessible to the public is enough to say that the work is communicated to the public.

**ADAPTATION:** Adaptation involves the preparation of a new work in the same or different form based upon an already existing work. The Copyright Act defines the following acts as adaptations:

- a. Conversion of a dramatic work into a non-dramatic work
- b. Conversion of a literary or artistic work into a dramatic work
- c. Re-arrangement of a literary or dramatic work
- d. Depiction in a comic form or through pictures of a literary or dramatic work
- e. Transcription of a musical work or any act involving re-arrangement or alteration of an existing work.

For example, the book "*Five Point Someone*" written by Chetan Bhagat was made as a film named "*3 Idiots*" in Hindi. It is noted that the concept of the film alone was taken and not the whole of its expression. Again, the remake of the film "*3 idiots*" was done in Tamil in the name of "*Nanban*". Again here some alterations were made to suit the targeted audience and therefore, only amounted to copying of idea and not the expression.

**TRANSLATION:** Similarly, the owner has the full and sole authority to translate the work done by him in one language to one or many other languages. Any other person interested in doing so must get the prior permission of the owner. For example, a film taken in English can be dubbed or remade only by the owner or any other person with the consent of the owner.

**Life of Right:** Generally copyright lasts for Life + 60 years in India.

The term of protection granted for works of copyright varies depending on the type of work sought to be protected. Literary or musical or artistic works (other than photographs), are granted copyright protection for a period which extends through the lifetime of the author and 60 years from the year in which the author dies. However, if the work has not been published, performed, or offered for sale or broadcast during the lifetime of the author, the copyright protection shall continue for a period of 60 years from the end of the year in which any of these acts are done relating to the work.

Cinematograph films, photographs and computer programs are protected for 60 years from the end of the year in which the work is made available to the public with the consent of the owner of the copyright or published work, or, failing such an event, for 60 years from the end of the year in which the work is made. Sound recordings are protected for 60 years from the end of the year in which the recording is first published.

### **MORAL RIGHTS**

In Indian copyright Act, 1957, the provision related to moral rights has been given. Indian copyright does not directly provides moral rights to the author but it provides special right to author, that are moral rights. These rights are independent and parallel of the author's economic rights. This provision is based on Article 6 bis of Bern Convention.

The language of section 57 is of wide aptitude and includes not just literary works but also visual and audio manifestations. The moral rights are as follows:-

1. Paternity right (right to claim authorship of the work)
2. The integrity right (the right to protect his honour and reputation)
3. A general right (not to have a work falsely attributed to him)

The commissioner's right of privacy in respect of photograph or film made for private and domestic purpose. Under section 57 of Indian copyright, an author has the right to claim the authorship of the work. He has also right to for restraining the infringement or to claim damages under section 55. The special protection of the copyright can be claimed even after the assignment of the copyright.

The author of a work has the right to claim authorship of the work and to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the work, if such distortion, mutilation, modification or other act is prejudicial to his honour or reputation. Moral rights are available to the authors even after the economic rights are assigned. (Section 57)

It is a statutory recognition of the special care with which the intellectual property is protected. The proviso to section 57 states that the author will not have the right to restrain or claim damages in respect of any adaptation of a computer programme by a lawful possessor of a copy of a computer programme, to utilise the computer programme for which it was supplied and to make backup copies as a temporary protection against loss. By the proviso, this section also confers the special rights on the authors of computer programmes.

A computer programme is defined to mean a set of instructions expressed in words, codes, scheme, or in any other form including a machine, or recordable medium capable of causing a computer to perform a particular task or achieve a particular result. [Section 2(ffc)].



Under section 57, the author has a right to restrain infringement or claim damages for infringement of the copyright. This section provides an exception to the rule that after an author has parted with his rights in favour of a publisher or other person, the latter alone is entitled to sue in respect of infringement. These rights are independent of the author's copyright and the remedies open to the author under Section 55 (relating to infringement of a copyright).

Section 57 clearly overrides the terms of the contract of assignment of the copyright. The contract of assignment would be read subject to the provisions of section 57 and the terms of contract cannot negate the special rights and remedies guaranteed by section 57. The assignee of a copyright cannot claim any rights or immunities based on the contract, which are inconsistent with the provisions of Section 57.

This section prohibits any distortion, mutilation or other modification of the author's work. The words "other modification" are ejusdem generis with the word "distortion" and "mutilation". The modification should not be so serious that the modified form of the work looks quite different work from the original. "Modification" in the sense of the perversion of the original, will amount to distortion or mutilation.

The court has taken view in the case of **Mannu Bhandari vs. Kala Vikas Pictures Ltd., AIR 1987 Del 13.**

In Mannu Bhandari case, the dispute related to author's moral right came before the court. In this case the plaintiff, Mannu Bhandari is author of Hindi novel 'Aapka Bunt' she assigned her some rights in raised objection about the title of the film which was resolved by the parties and the end of the film.

In the end of the novel the child was admitted in hostel by his natural father while in the film it was showed that the child died of starvation, the author said that it was against her integrity and honour. It was held that the contract of assignment has to be read subject to the provisions of section 5.

It held that the remedy of a restraint order or damages can be claimed even after the assignment either wholly or partially of the said damages further it was held that the section 57. Clearly overrides the terms of the contract of assignment of the copyright.

Section 57(l) (c) prohibits any mutilation or distortion of the authors work. Section 27 provides the bundle of rights, which are in tune with the international agreements and the treaties.

In the case **K. P. M. Sundaram Vs. Rattan Prakashan Mandir, AIR.1983 Del. 461** the plaintiff had instituted the suit against the defendant's for injunction restraining them from prompting, publishing and the specified books, rendition and accounts for the illegal gains made by the defendants for all unauthorized publications and for damages under the provisions of section 5 and 57. The plaintiff had granted sole and exclusive right to print, publish and exclusive right to print, publish and sell the work. In last clause it was further sole and exclusive right to print, publish and sell the work. Prima facie it was held that it did not assignee the copyright but created a revocable license in favour of defendants to publish and sell the works and the balance of favour to show the same. The defendant was restrained from printing. Publishing and selling the plaintiff till the disposal of suit.

#### **Conflict of Ownership in the Commissioned Work**

**Gee Pee Film Pvt Ltd vs. Pratik Chowdhary and others**, when the work is a combination of different works e.g. Cinematographic works sound recordings etc. The lack of clarity in the definition of "producer" became a mooted point. Such a question came before the court, where the question was by taking the financial responsibility of sound recording whether one will fall under the definition of 'producer'. Even though the plaintiff paid all the expenses of recording including hire charges of studio and remuneration of musicians, the Calcutta High Court

said, this case belonged to the concept of contract for services, where court held that under section 17 (b) of copyright act, the only instances where copyright gets lost is when someone comes under photography, paintings and etc. where defendants who composed the Bengali song, did not come under these categories and also the court rejected the other contention of the plaintiff, regarding plaintiff being a producer. The Court said, in order to be a producer, a person must take the initiative as well as responsibility of the sound recording, Court said "if a person bears all expenses for recording and keep the master tape thereof, such facts do not imply that he has also taken responsibility of the recordings and thus can't be held as producer . The word "responsibility" appearing in section 2(uu) of the act, does not refer to financial responsibility, but means consequential "legal responsibility"

Conflict of Ownership in Joint Authorship

The owner of the copyright means person who possess and enjoys the legal right. The definition given to the author in the context of copyright protection depends on the nature of the work & Section 2 (d) defines 'author'. The creator of the work can also be joint authors, but dilemma lies in determining the criteria for joint authorship, Section 2(z) of the Copyright Act defines work of joint authorship. Such an issue came before the court in ***Najma Heptulla v.Orient longmanLtd.***, the question before the Court was whether a person who gives form to the narration will become the joint author of the book India Wins freedom'. Even though the work was composed by Humayun Kabir (close associate of Maulana Azad) the material for the book was supplied by the Azad with a clear understanding that kabir will describe those thoughts and conversations and write the same in English language and Kabir's function was only to record Azad's findings and not to let his views colour the narrative . The preface itself shows it is the Azad who decided as to which 30 pages of the book were not to be publish and which of his views should be contain in his book and read every word of manuscript and made alterations additions, omissions and correction.

Court concluded that the work India Wins Freedom was the product of the active and close intellectual collaboration between Mulana Azad and Humayun Kabir in pursuance of pre-concerted joint design between the two that Azad would contribute the material for the book, and kabir will write the same in English. Such a work could neither be regarded as sole creation of either one of them, but as the work of Joint Authorship. However no specific criteria was laid down by the court to determine what amount to active and close intellectual collaboration to determine join authorship. It raises an interesting question whether a person who has not himself put pen to paper but someone else has done that effectively writing what the first person had created can become a joint author. Or mere recording a narration makes him a joint author. However, after this case no such issue has come before the judiciary.

In order to decide the ownership of copyright when the author does the work at the instance of any person for valuable consideration, or in the case of the course of employment under contract of service faces some complexity and what amounts to contract of service also depends on facts of each case & judiciary has laid down different tests to determine it. An author may create a work independently, or he may create a work under a contract of service or contract for service

That brings us to the controversy surrounding the Contract of Service and Contract for Services in Copyright law. The law distinguishes between these two terms and hence not every contract under which one works for another or provides services for another is a contract of service. As per Halsbury's Laws of England, a contract of service is not the same thing as contract for services, the difference being the same as that between an employee and independent contractor; an employee is a person who is subject to the demands of his employer as to the manner in which he shall work. The existence of direct control by employer, the amount of independence on the part of the person who renders services, and the place where service is rendered are all matters to be considered in determining whether there is contract of service.

Generally, there are not many difficulties in deciding whether the person is an employee or an independent contractor but sometimes difficulties may arise. Earlier, emphasis was placed on the amount of control of employer over employee. The case of ***Simmons vs. Heath Laundry Co.***, held that:

"The greater the amount of direct control exercised over the person rendering the services by person contracting for them the stronger the grounds for holding it to be a contract of service and similarly the greater the degree of independence of such control the greater the probability that the services rendered are of nature of professional services and the contract is not one of service."

In the case of ***V.T Thomas v. Malayala Manorama***, where the question before the court was after termination of employment of employee (Tom) from Manorama regarding the future work of Tom manorama can claim authorship, it was held that in the case of termination of the employment, the employee is entitled to the ownership of copyright in the works created subsequently and the former employer has no copyright over the subsequent work so created.

After his termination of employment from Manorama Tom is the author of the work he is free to draw the cartoons and Manorama has no right to restrain him from drawing the cartoon. Here the interesting question is that if the Manorama contented that they are the owner of the cartoons then is it possible for them to restrain Tom to use such characters. If the cartoon is developed during the course of employment whether the author can use it after his termination from employment. The Court in the end concluded that cartoon characters were developed by the author in 1957 which entitle him to copyrights.

In ***University of London Press Ltd vs. University Tutorial Press Ltd***. the examiner was free to prepare his questions at his convenience so long as they were ready by the appointment for the examinations, and it was left to his skill the syllabus, the book work, and the standard of knowledge to be expected at the matriculation examination, and in view of this aspect of matter, the examiner was not acting under the contract of service but contract for service. In that case the element of control was considered important in deciding whether or not the authors of certain examination papers, who were not on the staff of the University of London, were employed under contract of service. The Court answered in the negative.

Where a man employs another to do work for him under his control, so that he can direct the time when the work shall be done the means to be adopted to bring about the end, and the method in which the work shall be arrived on, then the contract is contract of service, copyright vest in the employer. If, on the other hand, a man employs another to do certain work but leaves it to that other to decide how that works shall be done. What step shall be taken to produce that desired effect, and then it is a contract for service. In such cases a copyright vests in him and not the employer. Control test is a useful way of determining whether a person is an employee where the parties are in master –servant relationship. But it provides little help in relation to those professions where a person has considerable amount of freedom. In the circumstances the courts have stressed that the question of whether someone is an employee depends on whether the work they perform is an integral part of the business. In determining whether someone is an employee, court, looks at nature of relationship and what is that and what it is that a person does in day to day activities. Also factors like their responsibility provide their own equipment, hire their own helpers, take financial risk and have opportunity of profiting from the task they perform. Also financial arrangement between the parties etc.

The present day approach should be to abandon the search for a single test, and instead to take a multiple or pragmatic approach, weighing upon all the factors for and against a contract of employment and determining on which side the scales eventually settle. Factors which are usually of importance such as – the power to select and dismiss, the direct payment of some form of remuneration, the organization of the workplace, the supply of tools

and materials (though there can still be a labor-only sub- contract) and the economic realities meaning who bears the risk of loss and has the chance of profit and whether the employee could be said to be 'in business on his own account'.

### **Conflict of Authorship in Cinematographic Film**

Generally, the author of cinematographic film is the first owner of the copyright in such film, but conflict can arise when the producer of particular film and composer of songs, those songs which are later used in that film. In case *IPRS Vs. Eastern India Motion Pictures*, The question before the court was whether the producer of a cinematography film can defeat the rights of composer of music or lyricist and the court held that u/s 17(b) there is automatic transfer of all rights of the author. Therefore, the producer is the owner of musical or sound recording the producer can defeat right of the composer of music or lyricist. But Sec 13(4) says that copy right in a cinematographic film or a sound recording shall not affect the separate copyright in any work in respect of it or a substantial part of which, the film, or, as the case may be, the sound recording is made, so by the combined reading of sec. 13(3) and (4) presupposes contractual relationship with these creators to safeguard the interest S.17 contemplates contract of employment and in the case of 17(b) cinematography film can be made under contract for employment in such cases copyright of composers and lyricists still remains with them. It is the contractual obligation which binds the producers and composers and lyricists, and 17(b) there is no automatic transfer of all rights of the author. In 17(b) there is no mention of the sound recording or literary or musical work only cinematographic film is mentioned. Therefore, the producer is not the owner of musical or sound recording unless it complies with S.17(c) thus the producer cannot defeat right of the composer of music or lyricist. So it is clear that intention behind S.17(b) is to provide incentive to the author of literary or musical or sound recording work otherwise the whole purpose of sec. 17 and 13(4) which safeguards the balance will be defeated. But here the court give different interpretation to 17(b) without considering S 13(4) and (5) and held that there is automatic transfer of all rights of authors u/s.17(b). By this decision, it will be the producer who will be enjoying economic benefits from the work of composer or lyricist. The producer is getting the right to incorporate literary or musical work in the cinematographic film. So once the literary or musical work of the composer or lyricist is incorporated in cinematographic film i.e., right u/s. 14(a)(iv) is transferred to the producer but the other rights of author on musical and literary work still rest upon composer or lyricist. To an extent it was made clear by later amendments in s. 2(g) & (uu) also s.14.

### **Q. Whether Copyright can be transferred? If so what is the procedure?**

Nobody is entitled to copy, reproduce, publish or sell an original writing, painting, dramatic production, sculpture, etc. without the permission of the creator. Thus, law provides a right to the owner of the copyright (i.e. the creator) to transfer the ownership of the copyright to a third party. For instance, in the case of making a complete movie – all the creative persons with their idea turned into relevant works come to a producer, assign their rights that subsist in their work in return for a royalty. These works are then summed up to form a complete movie.

### **Facets of Copyright Assignment**

1. It is a pecuniary opportunity for the first owner of copyright. The assignment must specify the amount of copyright [vide Section 19(3) of the Copyright Act]. The creator shall not assign or

waive the right to receive royalties to be shared on an equal basis with the assignee of copyright, subject to certain conditions. [vide Section 18(1) proviso of The Copyright Act, 1957.

2. In the case of an assignment of copyright in any future work, it shall take effect only when the work comes into existence. In this regard, "assignee" includes the legal representatives of the assignee, if he dies before the work comes into existence. [vide Section 18(1) proviso of the Copyright Act]
3. The ownership may be assigned either wholly or only for a part of the work in question. [vide Section 18(1) of the Act]
4. The Copyright Assignment must be in writing and signed by the assignor or by his duly authorized agent. [vide Section 19(1) of the Act]
5. The duration of assignment must also be specified. The Delhi High Court recognized Section 19(5) and stated that if the assignment deed is silent about the duration, it shall be deemed to be 5 years from the date of assignment.
6. The agreement deed may specify the territorial extent of such assignment. If silent, it shall be presumed to extend within India. [vide Section 19(6) of the Act]
7. The assignment shall be subject to revision, extension, or termination on terms mutually agreed upon by the parties. [vide Section 19(3) of the Act]
8. ***Where the assignee fails to exercise his rights within one year from the date of assignment, the assignment in respect of such right shall be deemed to have lapsed, unless otherwise specified in the assignment deed. [vide Section 19(4) of the Act]***
9. If the assignment is in contrary to the terms and conditions of the rights already assigned to a copyright society to which the creator is a member, it shall be deemed void. [vide Section 19(8) of the Copyright Act]
10. The creator is entitled to subsequent royalties in the course of future exploitation of a cinematographic film, which includes his work, other than by way of exhibitions in a cinema hall. For example, the creator will be entitled to subsequent royalties for satellite right, home video, internet rights, the etc. Similar clause has been added for the case of sound recording. [vide Section 19(9) and 19(10) of the Copyright Act]
11. In the case of a manuscript, the copyright being a personal property of the owner can be transmitted by testamentary disposition. [vide Section 20 of the Act]
12. The equitable assignment is just the agreement to assign.
13. The assignee has the rights of- translation, abridgment, adaptation, dramatic and filmmaking in the work.

14. For relinquishment of work, the author has to give notice in prescribed form to the Registrar of Copyrights or by way of public notice. On its receipt, Registrar shall publish it in the Official Gazette. With 14 days of the publication, the Registrar shall post the notice on the official website of Copyright Office, so that such notice remains in the public domain for not less than three years. Such right shall cease to exist from the date of the notice. [vide section 21 of the Copyright Act]

It may be noted in this context, that the author has an alternative for the shortcomings or confusions of assignment of copyright. They can register their work with a copyright society and thereafter license it to whomsoever they desire.

In case of Registered Copyright the Assignee has to make an application for registration of changes in the particulars of copyright entered in the Register of Copyrights in **Form V under Rule 16 of Copyright Rules, 1958** to be delivered by hand or registered post. Attested copies of the deeds of assignments should be enclosed with the application.

#### **Difference between Assignment and License**

a. Assignment of copy right and copyright license are two forms of contract involved in the exploitation of copyright work by a third party. License is an authorization of an act without which authorization would be an infringement. Licensing usually involves licensing of some of the rights and not the whole. Licenses can be exclusive or non exclusive. An assignment involves the disposal of the copyright. The author (assigner) assigns the copyright to another person (assignee) or transfers the ownership of the copyright.

b. Assignee will be the owner of the copyright as regard rights so assigned. The owner will be the owner of the copyright of remaining rights. The assignment could be for whole duration of the copyright or for a short duration. In case of Licensing, the ownership shall always vest with the owner (Licensor).

c. The licensee can join with the owner of the copyright and as a party to the infringement, and take an action for infringement against third party, **Bharat Law House Vs. Wadhwa AIR 1988,Del 6**, but a bonafide purchaser in good faith and for consideration of the proprietors interest without notice of previous licensee is unaffected by it. On the other hand, in case of assignment, where the ownership is transferred, the assignee himself can take action against the third party.

d. The licensee can however, sue the licensor for damages for breach of contract if the latter does not protect his interest. A licensee has a right to make alterations except in so far as his license expressly or impliedly restricts the right. A failure to pay royalties enables the licensor to revoke the license. But in the case of assignment it is not possible, **Gramophone Co of India Ltd v. Shanti Films Corpn AIR 1997 Cal 63**. But if there is any harsh terms which affects the author's right, it can lead to revocation if a complaint is made to the copyright Board. Where the assignee of a copyright becomes entitled to any right comprised in the copyright, the assignee as respects to the rights so assigned, and the assignor as respects the rights not assigned, shall be treated for the purposes of this Act as the owner of copyright and the provisions of this Act shall have effect accordingly.

e. Under Section 30 of the Copyright Act, if the licensee in the case of future work dies before the work comes into existence his legal representatives shall be entitled to such works, in the absence of any provision to the contrary. The expression "assignee" as respects the assignment of the copyright in any future work includes the legal representatives of the assignee, if the assignee dies before the work comes into existence. The owner of the copyright has the power to assign his entire rights or assign only some of the rights. In case the rights are split up there is only partial assignment.

### **Mode of assignment**

No assignment of the copyright in any work shall be valid unless it is in writing signed by the assignor or by his duly authorized agent. It shall identify the work, specify the rights assigned, duration, territorial extent of such assignment, amount of royalty payable to the author. If the period is not stated it shall be deemed to be five years and territorial extent shall be presumed to extend within India. If the assignee does not exercise such rights within one year from the date of such assignment it shall be deemed to have lapsed unless otherwise specified in the assignment. The assignor can file a complaint to the copyright board if the assignee fails to make sufficient exercise of the rights assigned, failure not attributable to the act or omission, then copyright board after such enquiry as it deems necessary may revoke the assignment, this provision may be used for u/s 31 as a ground for compulsory licensing.

Also regarding any dispute to assignment it follows the same procedure including an order for recovery of any royalty payable. If the terms of the assignment are harsh to the assignor (owner), it can be revoked, but after five years from the date of assignment. In the case of unpublished work the author must be a citizen of India or domiciled in India at the time of the creation of the work. Copyright in an architectural work will subsist only if the work is located in India irrespective of the nationality of the author.

### **Q. What are the works to be protected under the Copyright Act for Information Communication Technology? Write a note on protection of computer software.**

The term database is used to describe a compilation of works, data or other materials (i.e. collection of facts) arranged in a systematic or by logical principles methodical way. In other words, ordered set up by the compiler. In principle, the facts themselves cannot be protected but the order and organization can, if they show a certain level of creativity on the part of the author. When referring to databases it is necessary to distinguish between creative and non-creative databases because each is dealt with under a different set of legal rules. According to Lord Atkinson, for the subsistence of copyright, 'it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material does not possess and which differentiate the product from the material, *Macmillan & Co. Ltd v. Cooper, (1924) 40 TLR 186 at p. 188*. As mentioned above, database refers to collection of data, works, information or other independent material arranged in a systematic or methodical way following some basic principle of compilation; databases should be given copyright protection even if they are the compilation of non-original works as they are the result of skill and labour employed by the author in creating the work. For example, a database of articles on 'Indian Intellectual Property Laws' should be given copyright as it is a work that is the result of labour, skill and capital employed and judgment expended in selecting and arranging the articles by the creator of the database. And thus, many countries have treated database as literary work and copyright protection has been expended to databases,

provided, they are original.<sup>8</sup> Database has been given protection under different Copyright Laws under literary works. In India, databases have been treated as literary works. According to Section 2(o) of the Copyright Act, 1957: "*'literary work' includes computer programs, tables and compilation including computer databases.*"

A recent decision of the Federal Court, ***Telstra Corporation Ltd v Desktop Marketing Systems Pty Ltd, [2001] FCA 612*** has clarified that in Australia only a low level of creativity and originality is required for protection. Data bases can be protected under the Copyright Act as literary works. For the purposes of the Copyright Act a literary work includes "a table, or compilation, expressed in words, figures or symbols". In this case the literary works under consideration were the White Pages and Yellow Pages published by Telstra and various unpublished Telstra headings books.

### **Protection of databases in India**

Databases are protected as collections or compilations of literary and artistic works. The Indian Copyright Act, amended in 1994, provides protection for databases as 'literary works', which amongst others include works such as computer programmes, tables and compilations, and computer databases (The Copyright Act, 1994). It is the skill, labour, and judgment of the author that is protected, irrespective of the form in which the product appears.

Indian Copyright Act, 1957 protects "Databases" as 'literary works' under Section 13 (1) (a) of the Act which says that Copyright shall subsist throughout India in original literary, dramatic, musical and artistic works. The definition of literary works "as defined under Section 2(o) of Copyright Act, 1957 includes computer programmes, tables and compilations including computer data basis. Section 63B of the Indian Copyright Act provides that any person who knowingly makes use on a computer of an infringing copy of computer program shall be punishable for a minimum period of six months and a maximum of three years in prison. It is pertinent to mention here that the Indian courts recognise copyright in databases. It has been held that compilation of list of clients/customers developed by a person by devoting time, money, labour and skill amounts to "literary work" wherein the author has a copyright under the Copyright Act.

As such if any infringement occurs with respect to data bases, the outsourcing parent entity may have recourse under the Copyright Act also.

The Information Technology Act, 2000 defines "Data" under Section 2 (o) as a representation of information, knowledge, facts, concepts or instructions, which are being prepared or have been prepared in a formalized manner and is intended to be processed, is being processed or has been processed in a computer, computer system or computer network and may be in any form (including) computer print outs, magnetic or optical storage media, punched cards. The term computer Data Base has been defined under the Indian Legal System for the first time in the information technology Act, 2000 under Section 43 explanation (ii) as a representation of information, knowledge, facts, concepts or instructions in text, image, audio, video data being prepared or have been prepared in formalized manner or have been produced by the computer, computer system or computer network are intended for use in computer, computer system or computer network. Section 43 of Information Technology Act, 2000 provides for compensation to the aggrieved party up to One Crore Rupees from a person, who without the permission of the owner or the person who is in charge of computer, computer system or computer network secures, access to the system or downloads data or downloads, copies or extracts any data or data base or information from the said computer, computer system or computer network or secures access to the system or downloads data or downloads, copies or extracts any data or data base or information from the said computer, computer system or computer network which includes the data hold or stored in any removable storage media. Section 43 of the Act is very wide and cover instances of cracking the computer codes, computer trespass, digital copying, violation of privacy, data theft etc. Section 66 of the Act provides for penal liabilities to the person, who



with the intent to cause or knowingly that he is likely to cause wrongful or loss or damage to the public or any person, alters or destroys any information residing in the computer resource or diminishes its value or utility or affects it injuriously by any means, the term commonly used for such crimes is 'hacking'.

### **Copyright Protection of Computer Software/Program**

As others have noted, there is a digital divide between the developed countries and the developing world. In the knowledge-based global economy, computer technologies are an essential requirement for accessing and using information, accelerating technology transfer and boosting the growth of productivity. At the same time, computer software products are perhaps the most heavily protected of all forms of knowledge-based products. Under the TRIPS Agreement, computer programs now qualify for copyright protection just as any other literary work, as well as for other forms of IP protection, including by patents in some nations, such as the US. Developing countries, of course, have a range of requirements for computer software applications in their industries, hospitals, schools and government offices. But most commonly, they need affordable access to off-the-shelf business software packages, such as word processing, spreadsheet, e-mail and Internet browsing products. Companies in Europe and North America, with Microsoft being the major player, dominate the global market for these products. The software industries of developing countries, even in India, are mostly absent from the off-the-shelf, packaged computer programs sector.

Copyright matters most in the computer software industry to the off-the-shelf business applications sector. Unlike bespoke software applications, these products have a mass market and can be easily copied. Copyright protection enables companies to prevent copying, limit competition and charge monopoly prices for these products. In developing countries, this presents two main problems. First, as there is currently widespread copying together with low local purchasing power in developing countries, there is a concern that stronger protection and enforcement could mean a more limited diffusion of such technologies. This may be a particular risk because the network effects of business applications tend to re-enforce the dominance of existing software producers. Examining the evidence, however, we conclude that this problem is not insurmountable for developing countries, if the right steps are taken. For example, governments and donor organizations could review their software procurement policies with a view to giving greater consideration to low cost business software products, including generic and open source products that are widely available.

The second problem is that where the source code of software is also protected, this may make it harder to adapt the products for local needs. It may also restrain competition in development of inter-operating applications, through follow-on innovation by reverse engineering. Under TRIPS, developing countries are permitted the flexibility to allow reverse engineering of software, so this problem may be avoided if national copyright laws are drafted appropriately. As another practical measure, more widespread use of the various open source software products, where source code is made available unlike proprietary software, may be considered. Alternatively, some in industry argue that with stronger copyright enforcement, closed source proprietary developers may be more willing to make source code available to software developers in developing countries.

It is clearly beyond our mandate to recommend what kind of policies developing countries should follow for procurement of computer software. For instance, whilst low cost or open source software may *a priori* offer cost and other advantages over proprietary software, many factors besides software license fees affect the total cost of an IT system such as customizing the system to the user's specific needs, as well as servicing, and maintaining the system. That said, given the considerable needs which developing countries have for information and communication technologies and the limited funds which are available, it would seem sensible that governments and donors should certainly consider supporting programs to raise awareness about low cost options, including

open source software, in developing countries. In present time most countries have protected computer software and programs under copyright.

### **Copyright Protection of Computer Software/Program in India:**

In India, the Intellectual Property Rights (IPR) of computer software is covered under the Copyright Law. Accordingly, the copyright of computer software is protected under the provisions of Indian Copyright Act 1957. Major changes to Indian Copyright Law were introduced in 1994 and came into effect from 10 May 1995. These changes or amendments made the Indian Copyright law one of the toughest in the world.

The amendments to the Copyright Act introduced in June 1994 were, in themselves, a landmark in the India's copyright arena. For the first time in India, the Copyright Law clearly explained:

- The rights of a copyright holder
- Position on rentals of software
- The rights of the user to make backup copies

Since most software is easy to duplicate, and the copy is usually as good as original, the Copyright Act was needed. Some of the key aspects of the law are:

- According to **Section 14** of this Act, it is illegal to make or distribute copies of copyrighted software without proper or specific authorization.
- The violator can be tried under both civil and criminal law.
- A civil and criminal action may be instituted for injunction, actual damages (including violator's profits) or statutory damages per infringement etc.
- Heavy punishment and fines for infringement of software copyright.
- **Section 63 B** stipulates a minimum jail term of 7 days, which can be extended up to 3 years.

**Section 2(ffb)** provides that: "*Computer*" includes any electronic or similar device having information processing capabilities.

**Section 2(ffc)** defines: "*Computer program*" means set of instructions expressed in words, codes, schemes or in any other form, including a machine- readable medium, capable of causing a computer to perform a particular task or achieve a particular result.

**Section 2(o)** provides that: "*Literary work*" includes computer programs, tables and compilations including computer database.

### **Copyright and the Internet: The International Framework**

Until recently, international copyright law rested on the Berne Convention for the Protection of Literary and Artistic Works and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1995. Issues relating to sound recordings and performances (sometimes referred to as "related rights") were addressed in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961). Since 1974, the international copyright instruments have been managed by a special United Nations agency

– the World Intellectual Property Organization (WIPO). WIPO's objective, as described in the treaty establishing it, is to promote the protection of intellectual property throughout the world through cooperation among States and, where appropriate, in collaboration with other international organizations. Currently, WIPO consists of 180 member states. WIPO administers six copyright treaties and aims at "homogenizing national intellectual property protections with an ultimate eye towards the creation of a unified, cohesive body of worldwide international law."

**a. The Berne Convention:** As mentioned above, the first attempt to harmonize copyright law at a global level dates back to adoption of the Berne Convention in 1886. The Convention established a minimal level of copyright protection for the member nations to follow and adopted the "national treatment policy" (under which a member state must give the same protection to material copyrighted in other member states as it gives to material copyrighted under its own law). The treaty also established that the International Court of Justice in the Hague ("Hague Court") would exercise jurisdiction over disputes between member nations, but the Treaty left nations free to declare their immunity from the jurisdiction, and many states have done so. Indeed, the Hague Court has never presided over a treaty compliance dispute to date.

**b. The TRIPS Agreement:** The General Agreement on Tariffs and Trade ("GATT") has also addressed copyright issues, in parallel to WIPO. The goal of the GATT is to "promote the reduction of tariff barriers to the international movement of goods." The GATT has been updated and revised regularly in the course of multinational discussions ("Rounds"). As copyright was becoming increasingly important in shaping international trade with the advent of the information society, the 1994 Uruguay Round of GATT produced TRIPS – the Agreement on Trade-Related Aspects of Intellectual Property Rights. The same Round also instituted the World Trade Organization (WTO).

The TRIPS Agreement adopts portions of the Bern, Rome and Paris Conventions in enunciating norms for intellectual property laws. Article 9.1 of TRIPS Agreement provides that, "Members shall comply with Articles 1 through 21 of the Bern Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived there from."

So it is clear that the approach taken in the copyright provisions of the TRIPS Agreement is to adopt the regime of copyright protection provided in the Berne Convention. Article 10.1 provides that, "Computer programs, whether in source or object code, shall be protected as literary works under the Bern Convention." Article 10.2 further provides that, "Compilation of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such."

**c. World Intellectual Property Organisation:(WIPO):** WIPO is an organisation of the United Nations (UN). Before its establishment, there were many organisation established under certain individual organs like the Assembly of Paris Union, the Executive Committee and the international Bureau of Bern which were later united in an organisation called 'Bureau International Reunis Pour La Protection de La Propriete Intellectuelle' known as 'BIRPI'. WIPO's activities are of four kinds: registration, promotion of inters- governmental cooperation in the administration of intellectual property rights, specialized program activities and latterly, dispute resolution facilities. In 1996, member countries found it necessary to form a treaty to deal with the protection of copyright evolvement of new technology.

**d. WIPO Copyright Treaty, 1996:** It was adopted by the Diplomatic Conference at Geneva on December 20, 1996. This treaty is a special agreement within Article 2 of the Berne Convention. It is related to digital technology and the Internet. The WIPO copyright treaty is a special agreement amongst the member countries to grants authors more extensive rights than those granted by the Berne Convention. Article 4 of the treaty provides that,

"Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression." Article 5 further states that "compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation." WIPO Copyright treaty generally covers all kinds of computer programs and not just the object code or source code of computer programs as it was in TRIPS Agreement. So it can be said that ignoring the minor changes adopted by WIPO Copyright Treaty, it is not inconsistent with the TRIPS Agreement.

### **Internet Protection in India**

The Internet system is spreading fast in India. There are many issues related to internet. But one of the biggest issues concerning Internet is protection of intellectual property- works of the mind. As per Section 13 and 63 of Indian Copyright Act, 1957 literary works, pictures, sound recordings and other creative works are protected from being copied without the permission of the copyright holder. It is yet unclear how copyright law governs or will govern these materials as they appear on the Internet. The Copyright Act, 1957 does not deal with the liability of ISPs at all. However, the liability of ISPs finds mention in Section 79 of the Information Technology Act, 2000 as follows:

‘Network service providers not to be liable in certain cases-For the removal of doubts, it is hereby declared that no person providing any service as network service provider shall be liable under this Act, rules or regulations made there under for any third party information or data made available by him if he proves that the offence or contravention was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence or contravention.

Explanation-For the purposes of this Section,-

(a) ‘network service provider’ means an intermediary;

(b) ‘third party information’ means any information dealt with by a network service provider in his capacity as an intermediary.’

Section 79 of the IT Act exempts ISPs from liability for third party information or data made available by him if the ISP had no knowledge of the offence committed or if the ISP had exercised ‘all due diligence’ to prevent any infringement.

### **Q. Discuss the various rights of broadcasting organisation and of performers (neighbouring rights).**

**Nature of Broadcasting Rights** Within the ambit of copyright, broadcasting organizations are given some special economic rights for the protection of their investment. Unlike copyright, the broadcaster's rights are not based upon a creative contribution to the work. They are rather based on the protection of the broadcaster's investment, and are obtained simply by broadcasting the work to the public. Although the broadcast itself is treated at par with an original work capable of copyright protection, the copyright in the work or the content underlying the broadcast is unaffected by the broadcast reproduction right.

The Delhi High Court has stated that as per Clause 11 of the *Statement of Objects and Reasons of the Copyright Act*, the broadcasting reproduction rights were akin to the rights of a copyright holder. This terminology in itself

showed that the two rights, though akin to each other, operated in *exclusive* and *separate* ambits, ***ABC Inc. v. Prime Time 24 Joint Venture***, 67 F. Supp. 2d 558.

### **Whose right is it?**

Generally an author of the original work has the right to communicate the work to the public. (**Section 14**) This right to communication also includes the right to communicate through a broadcast. Therefore, the broadcasting organization can acquire a license from the author and convert the work into a signal and broadcast it. If this is the case, clearly broadcasting organizations cannot have a right over the broadcast, it being a right of the author.

### **What is a 'broadcast' and a 'broadcasting organization'?**

As seen in Section 2.2, whether a particular broadcast is protected under the copyright law is contingent on its being covered by the definition of the term 'broadcast'. This is on the account of the fact that the medium of transmission must be covered under the definition. Thus, a particular medium of transmission may technologically be defended as a broadcast but it may not warrant protection unless it satisfies the statutory definition.

The Indian Copyright Act, 1957 does not recognize a broadcast as an independent creative work but grants, broadcast reproduction rights to broadcasting organizations. Section 2 (dd) defines broadcast as follows: 'Broadcast' means communication to the public-

(i) by any means of wireless diffusion, whether in any one or more of the forms of signs, sounds or visual images; or

(ii) by wire, and includes a re-broadcast."

The word broadcast can be used in two contexts, i) as a verb describing the transmission i.e. broadcasting, ii) as a term denoting either the signal or the act of transmitting the broadcast signals. But the right to transmit the work thereby communicating it to the public is the author's right and not the broadcaster's right. Assuming this the 'broadcast' would only cover the signal and not the entire transmission. International conventions including the Rome Convention define the word 'broadcasting' and not the word 'broadcast' in terms of transmission of the work through wireless means. Thus in the international context the word 'broadcast' is used as a noun denoting the signal, which is to be protected, and the word 'broadcasting' is used to denote the act of transmission. Whereas, in the Indian context, it is used as a verb to demonstrate the mode of transmission of the signal. It is the right of the author to have the work broadcasted (noun) and it is the right of the broadcasting organizations to broadcast (verb) the work.

The definition does not clarify whether the 'diffusion' to be considered is by analogue signals (TV and radio) alone or also by digital signals (Internet). However, the definition of, communication to the public conveys that satellite or cable, or any other means of simultaneous communication' where information reaches more than one household is deemed to be communication to the public. Considering this definition, Internet can be said to be a means used for broadcasting. However, it is highly uncertain whether the new technological concepts involving digital transmission can be accommodated in the existing regime of neighbouring rights by an interpretative innovation. The Copyright Act also does not define a '*broadcasting organization*'. In today's day and age virtually anyone with Internet availability is a broadcaster where one can upload, download, reproduce and record audio-visual content.

Since broadcast has been defined broadly, anyone communicating to the public through wireless means or by a wire can be said to be a broadcaster. Thus, the definition of broadcast lacks clarity. Instead of defining

'broadcasting' the legislators have defined broadcast to cover transmission of a program, which gives protection beyond what is actually entailed. Without conceptual clarity, there will be overlap between 'broadcasting rights' of the author and 'broadcast reproduction rights' of the broadcasting organizations.

#### **What is broadcast reproduction or re-broadcast?**

The Indian Copyright Act, 1957 grants exclusive right to broadcasters to reproduce the broadcast for the period for which they hold the right. The law also restricts any sound or visual recording of the broadcast. It is, however, not specified as to rebroadcast or retransmission through what medium is illegal; only through the medium in which the original signal was broadcast or through any other means. For example, if the original broadcast was of a live performance of a singer shown live on TV. If I take an audio recording of his performance and put it on the Internet, will I be infringing the broadcaster's reproduction rights? If indeed this is illegal, then it would have a serious negative impact on the flow of information on the Internet. It will further give greater rights to broadcasting organisations to censor information under the pretext of protecting copyright in the work.

The Copyright Act does not separately define a re-broadcast but says that a broadcast includes a re-broadcast. It is unclear whether the Copyright Act prevents, reproduction 'of the broadcast or re-broadcast' itself or both.

#### **PERFORMERS RIGHT**

The Indian film industry has been known for its melodious and catchy Bollywood songs. However, it is important to ask if the singers singing these songs are getting their due credit. Before the 2012, Rights of performers, including singers, was not recognized in India. A work-for-hire system was followed in the Industry, where the composer became the copyright owner of the "musical works" and the producer became the copyright owner of the "cinematograph film" or "sound recording". Thus, the composers and producers enjoyed various rights under the Indian copyright law; however, the singers and musicians did not receive any royalties. Many of the musicians and singers even died in penury.

In 2012, the Indian Copyright statute, i.e., The Copyright Act, 1957 ("The Act"), was amended to introduce expansive rights for performers. The Copyright Amendment Act, 2012, ("2012 Act"), provided authors of underlying works used in cinematograph films and sound recordings with inalienable right to royalty in certain circumstances, irrespective of the fact that they had assigned the copyright in those works to the film producer or music composer. The 2012 Act, also conferred the performers with right to receive royalties if their performances were being *used* for commercial purposes, even though he would have agreed to incorporate the performance in a cinematograph film. It was also ensured that the performer's rights were in consonance with the international treaties, i.e., Article 14 of the TRIPS agreement as well as Articles 5 to 10 of WIPO Performances and Phonograms Treaty. The musicians, singers and other performers of the industry, saw this amendment as a welcome move, as they were no more merely vocal instruments.

#### **PERFORMERS RIGHT UNDER COPYRIGHT ACT**

The Act provides an inclusive definition of the term "performer" in Section 2(qq), which states that it "includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance". The phrase "any other person who makes a performance" expands the meaning of the word "performer" to a great extent. However, the provision also provides a limitation that a person whose performance is casual or incidental in nature to a cinematograph film, would not be considered a "performer" under the Act.

Section 2(q) of the Act, defines “performance” to mean any visual or acoustic presentation *made live* by one or more performers. Thus, the term “performance” appears to be restricted to only live performances. However, Explanation 3 to Rule 68 of the Copyright Rules, 2013, (“the Rules”), expands the meaning of “performance” to include “recording of visual or acoustic presentation of a performer in the *sound and visual records in the studio or otherwise*”. Moreover, the Delhi High Court has observed, “Every performance has to be live in the first instance whether it is before an audience or in a studio” [*Neha Bhasin v. Anand Raj Anand, 2006 (32) PTC 779 Del.*]. Thus, upon harmoniously reading the Act and the Rules, it can be said that the term “performance” is not restricted to live performances before an audience, but also includes live performances in a studio.

**Right to Royalties:** The performer’s right subsists for 50 years from the date on which the performance is made (Section 38).

Section 38A of the Act confers an exclusive right upon performer’s to do or authorize the doing of any of the following acts in respect of the performance or any substantial part thereof :

- to make a sound recording or a visual recording of the performance;
- to reproduce the performance in any material form including the storing of it in any medium by electronic or any other means;
- to issue copies of the performance to the public not being copies already in circulation;
- to communicate the performance to the public;
- to sell or give the performance on commercial rental or offer for sale or for commercial rental any copy of the recording and;
- to broadcast or communicate the performance to the public except where the performance is already a broadcast.

It is important to note that performer’s rights would run parallel to the copyright of the producers/ music composers and both are entitled to economic benefits from the commercial use of the performance [ **Section 38A (1)**]. However, once the performer has agreed in writing to incorporate his performance in a film, the performer cannot prevent the producer of the film from enjoying performer’s rights in the same film. Further, the performer has an un-assignable right to receive royalties in cases where the performance is being communicated to the public, other than along with the film in which the performer has agreed to incorporate his performance [ **Section 38A (2)**].

Additionally, authors of underlying works in a cinematograph film cannot waive their right to receive royalties on an equal basis along with the assignee, in cases where the work is being used other than along with the cinematograph film. [ **Section 18 and Section 19(9)** ] Similarly, authors of literary or musical work included in a sound recording have a continuing right to receive royalties, on an equal basis along with the assignee, upon use of their work in any form. [ **Section 18 and Section 19(10)** ]

Thus, performers and authors of underlying works included in films/ sound recordings have an inalienable right to receive royalties under the amended Act. The Performer can assign the right to receive royalties to a copyright society or his legal heir; any agreement to the contrary shall be void.

**Moral Rights:** Section 38 B of the Act confers moral rights upon performers. The Performer will have the right to claim to be identified as the Performer of his performance except where omission is dictated by the manner of the use of the performance [Section 38B (a)]. He will also have the right to restrain or claim damages in respect of any distortion, mutilation or other modifications of his performance that would be prejudicial to his reputation [Section 38B (b)]. However, the law clarifies that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the reputation of the Performer [Explanation to Section 38B (b)].

#### **Exceptions to Infringement of Performer's Rights**

Under Section 39 of the Copyright Act, 1957 certain acts do not constitute infringement. These are:

- a) The making of any sound recording or visual recording for private use of the person making such recording or solely for the purpose of bonafide teaching and research;
- b) Fair dealing of excerpts in a performance in the reporting of current events or a bonafide review, teaching or research;
- c) Other acts with any necessary adaptation and modification which don't constitute infringement of the copyright under Section 52;
- d) Reproduction for the use of judicial proceedings;
- e) Reproduction for the use of the members of the legislature;
- f) Use of sound recording or visual recording of the performance in the course of the activities of an educational institution if the audience are limited to the students and parents and guardians of the students and persons directly connected with the activities of the institution; and
- g) Makes a sound recording or visual recording of the performance. Thus making of the sound recording or visual recording of or the above purposes doesn't constitute infringement.

#### ***Judicial Approach***

The judiciary has also been proactive in enforcing the performer's rights. The Delhi High Court held that playing songs in the restaurant for two hours without obtaining the Clearance Certificate or without paying royalty constituted infringement of the Copyright Law [Indian Singer's Rights Association v. Chapter 25 Bar and Restaurant, CS (OS) 2068/2015 & IA No. 14261/2015]. The Court further clarified that any public performance of a song, even at a public event that did not charge a price of admission, needs a No Objection Certificate (NOC) from the collecting society, and payment of royalties.

Similarly, in the case of [Indian Singer's Rights Association "ISRA" vs. Night fever club and lounge, CS (OS) No. 3958 of 2014.] public performance of songs of the members of the collecting society at the Defendant's Club and Lounge, without the permission of the Plaintiff and without payment of royalties, was held to be illegal and in violation of Plaintiff's Performers Rights. This case was different from the prior case as recorded versions of the song were being played instead of someone performing the songs live. Thus, we can see that judiciary has also expanded the scope of performer's rights.

#### ***Conclusion***



The introduction of performer's rights has been much appreciated by various music artists of the Indian film industry. However, this is a fairly new right and we need to see how it is interpreted to see its actual benefits. With the coming of the performer's rights, public places have to take permissions from both performer's societies and copyright societies before using any performance for public purposes. India also has a huge community of unprotected folklore, these new rights will also help in safeguarding their interests and giving them due recognition.

**Q. Discuss the law relating to "licensing and publication of Copyright"**

A license is the transfer of interest in a copyright. In a license, the rights granted are limited. A grant of a license to a person authorizes the licensee to use the copyrighted work without any claim of infringement or unauthorized use being brought by the owner of the copyright against the licensee.

A license is different from an assignment as the licensee gets certain rights subject to the conditions specified in the license agreement but the ownership of those rights vests solely in the owner of the copyright. On the other hand, in case of an assignment, the assignee becomes the owner of the interest assigned to him. The original owner of the copyright transfers all his/her rights to the assignee and retains none.

A license can be voluntary or compulsory.

**VOLUNTARY LICENSING:** Section 30 of the Indian Copyright Act defines what is meant by voluntary licensing. According to Section 30:

*The owner of the copyright in any existing work or the prospective owner of the copyright in any future work may grant any interest in the right by license in writing signed by him or by his duly authorized agent.*

Therefore, the copyright owner of any existing work or the prospective owner of any future work can grant any interest in the right by way of a license. However, it has to be borne in mind that in case of a future work, the license will come into force only when the work comes into existence.

**COMPULSORY LICENSING:** Compulsory license is the term generally applied to a statutory license to do an act covered by an exclusive right without the prior authority of the right owner. Compulsory licensing allows for the use of protected (in this case, copyrighted material) without the prior permission of the owner of the right.

Section 31 of the Indian Copyright Act provides for the compulsory licensing of copyright in case of works that are withheld from the public. In case the copyright owner has refused to:

Republish or allow for the republication of the work or has refused to allow for the performance of the work in public due to which the work is withheld from the public;

Allow communication of the work to the public by way of broadcast of such work, or in the case of sound recording the work recorded in such sound recording on terms which the complainant considers reasonable,

The Copyright Board can, after providing reasonable opportunity for the owner of the copyright to be heard and after conducting an enquiry and if satisfied, can direct the Registrar of Copyrights to grant a compulsory license to the complainant to republish the work, broadcast the work or communicate it to the public as the case may be. Upon such direction, the Registrar of Copyrights shall grant the license to the complainant.

Further a compulsory license can also be granted in case of unpublished Indian works. Section 31A provides for the same. In case of an unpublished work wherein the author is dead or unknown or cannot be traced, any person may apply to the Copyright Board seeking for a license to publish such work.

An important case with regard to compulsory licensing is *Entertainment Network (India) Ltd. v. Super Cassette Industries Ltd.* In this case, Radio Mirchi was playing music, the rights of which were held by Super Cassette Industries. The music company filed for permanent injunction and while the suit was pending, the FM operators filed an application before the Copyright Board for the grant of compulsory license under Section 31(1)(b) of the Copyright Act. The question that arose here was whether in such a certain circumstance, granting of a compulsory license was viable. The broadcasters, i.e. Radio Mirchi argued that since a license had already been granted to AIR and Radio City, there were no grounds on which a license to Radio Mirchi should be denied. The Court held that since a compulsory license can be granted on grounds stated in Section 31A of the Copyright Act, i.e. only when access to the work has been absolutely denied to the public. In this case, license had already been granted to AIR and Radio City. Therefore, it was not absolutely barred to public access. Therefore, the argument of Radio Mirchi holds no water and they were liable for infringement of copyright.

### **WHY IS COMPULSORY LICENSING SO IMPORTANT?**

The primary objective of compulsory licensing is to ensure the availability of copyrighted material. The Indian Copyright Act grants protection to the works of writers, artists etc. so that they can benefit from the results of their hard work and creativity. However, this comes at a price i.e. the work should be available for access and fair use for other individuals. There are times when copyright owners refuse to part from their work. In such a case, in order to ensure availability of copyrighted material to the public and free flow of ideas and information without infringing the rights of the copyright owner, compulsory licensing becomes a necessity.

### **Types of Licenses under the Copyright Act, 1957 as amended in 2012**

Chapter IV of the Copyright Act discusses licensing of copyrighted works. This chapter discusses seven different types of licenses issued by the Copyright Board:

**a) Compulsory licenses for works withheld from the public:** According to this provision, any person may approach the copyright board, for issuance of a compulsory license to publish a work that is withheld from the public by the copyright owner. However, before approaching the Copyright Board, the complainant should have approached the copyright owner first for a license to republish or perform the work and the copyright owner should have unreasonably rejected the request of the complainant.

**b) Compulsory licenses for unpublished works of unknown authors:** In case of unpublished works of unknown or dead authors, any person may apply to the Copyright Board for a license to publish or communicate to the public such works or translations thereof. However, before making such an application, the applicant is required by law, to publish his proposal to do so in a national newspaper.

**c) Compulsory licenses for the benefit of the disabled:** Any person or non-profit organization working for the benefit of the disabled may apply to the Copyright Board for a compulsory license to publish any work in a format suitable for their accessibility.

**d) Statutory licenses for Cover Version:** Section 31C of the Copyright Act provides for the grant of statutory licenses for making cover versions of any sound recordings. This section specifically requires the Copyright Board to fix the minimum amount of royalty to be paid for the creation of such a version.

**e) Statutory licenses for Broadcasting literary, musical works and sound recordings:** This license is issued by the Copyright Board in favour of any broadcasting organization desirous of broadcasting to the public any literary, musical work or sound recording which is already published by the copyright holder. Although the Copyright Board is authorized to determine the royalties payable under this license, the Board is yet to convene and determine these royalties.

**f) License to produce and publish translations:** This license issued by the Copyright Board permits the applicant, after the applicant pays a determined royalty to produce and publish a translation of literary or dramatic work, after seven years of publication of said work. It is pertinent to note here, that this licensing is not applicable to cinematographic films and sound recordings.

**g) License to reproduce and publish works for limited purposes:** The Copyright Board may issue licenses to publish a work in India if the editions of such literary, scientific or artistic works are not made available in India. The Copyright Board, in case of such applications, may issue the license after determining the royalty to be paid to the copyright holder.

#### **Q. Explain the powers and functions of the Copyright Board and Copyright Society in India.**

The Copyright Board, a quasi-judicial body, was constituted in September 1958. The jurisdiction of the Copyright Board extends to the whole of India. The copyright board is a body constituted by the central govt. to discharge certain judicial function under the Act. **[Sec. 11(1)]** The Board is entrusted with the task of adjudication of disputes pertaining to copyright registration, assignment of copyright, grant of Licenses in respect of works withheld from public, unpublished Indian works, production and publication of translations and works for certain specified purposes. It also hears cases in other miscellaneous matters instituted before it under the Copyright Act, 1957

It consists of a chairman and not more than fourteen other members. **[Sec. 11(1)]** The Chairman and the members shall hold their office for five years. They may be reappointed on the expiry of the tenure. **[Sec. 11(1)]** The chairman of the copyright board must be a person who is or has been judge of a High Court or is qualified for appointment as a judge of a High Court. **[Sec. 11(3)]** There is no qualification mentioned about the members of the Board.

The Registrar of Copyright also plays a very important role. The Registrar of the copyright board will perform all secretarial functions of the copyright board. **[Sec. 11(4) read with Sec. 4(4)]** The Registrar of the Copyright is the authority under Section 9 of the Act who is the officer of the Copyright Office. The Registrar of Copyright has powers of the civil court. **[Sec. 74]** And every order made by the registrar of payment of money is deemed as a decree of a civil court and is executed as decree of such court. **[Sec. 75]**

#### **Powers of Copyright Board**

The copyright board has been constituted to perform judicial functions.

Therefore, the copyright board has been accredited with the powers of civil court for the purpose of Sec. 345 & 346 of the Code of Criminal Procedure, 1973. All proceedings of the court are judicial proceedings within the meaning of Sec. 193 & 228 of Indian Penal Code, 1860. **[Sec. 12(7)]** In exercise of the civil court power, the copyright board may issue summons and enforce the attendance of any person and may examine him on oath, requiring the discovery and production of the document, receiving evidence on affidavit issuing commission for the examination of witness and documents and requisitioning public record or copy thereof from any court.

The Registrar of Copyright and the Copyright Board have the powers of a civil court in respect of the following matters: **[Sec. 74]**

- (a) Summoning & enforcing the attendance of any person and examining him on oath (this jurisdiction extends to the whole of India); **[Explanation to Sec. 74]**
- (b) Requiring the discovery and production of any document;
- (c) Receiving evidence on affidavit;
- (d) Issuing commission for the examination of witnesses and document;
- (e) Requisitioning any public record or copy thereof from any court or office;
- (f) Any other matter which may be prescribed.

#### **Functions of Copyright Board**

The first and foremost function of the copyright board is to look after whether the provisions of the Act are followed without any violation or infringement and to adjudicate certain cases pertaining to copyrights.

Other than this, the copyright board has been provided direct jurisdiction in relation to matters:

- (1) To decide the issue of publication and its date in order to determine the term of copyright **[Sec. 6(a)]**
- (2) To decide the term of copyright which shorter in any other country than that provided in respect of that work under the Act **[Sec. 6(b)]** (The decision of the Copyright board on the above question will be final)
- (3) To settle disputes related to assignment of copyright **[Sec. 19(A)]**
- (4) To grant compulsory licenses for Indian work **[Sec 31]**
- (5) To grant compulsory licenses to publish the unpublished work **[Sec 31A]**
- (6) To grant compulsory licenses to produce and publish translation of literary and dramatic works **[Sec 32]**
- (7) To grant compulsory licenses to reproduce and publish certain categories of literary, scientific or artistic works for certain purposes **[Sec. 32A]**
- (8) To rectify the Register of copyrights on the application of registrar of copyrights or any aggrieved persons **[Sec. 50]**

Other than this, another important function of Copyright Board is carried out by the Registrar of Copyright Board. The Registrar maintains a Register of Copyrights containing the names or titles of works and the names and addresses of authors, publishers and owners of copyright and other particulars as may be prescribed. **[Sec. 44]** The Register of Copyright will be kept in six parts as follows: **[Rule 15 of The Copyright Rules. 2013]**

Part I – Literary works other than computer programs, tables and compilations including computer databases and dramatic works.

Part II – Musical works

Part III – Artistic works

Part IV – Cinematograph films

Part V – Sound recordings

Part VI – Computer programs, tables and compilations including computer databases.

**Note:** As per Sec. 50A of the Act every entry made in the Register of Copyright should be published in the official gazette or in such manner as the registrar may deem fit.

**Registration of Copyright:** registration of copyright is not compulsory under sec. 44 of the Act. The registration is neither required for acquiring copyright nor for enforcement. [**Kumari Kanak vs. Sundara Rajan; (1972) Ker LR 536**] Registration is merely a piece of evidence as to when certain author started claiming copyright in the artistic or other work. [**Glaxo vs. Samrat Pharmaceuticals; AIR 1984**]

#### **Procedure of Copyright Board**

The copyright board has power to regulate its own procedure, [**Sec. 12(1)**] including the fixation of places and times of its sittings. This is subject to the Copyright Rules, 1958. Ordinarily it will hear any proceeding instituted before it within the zone in which the person instituting the proceedings actually and voluntarily resides and carries on business or personally works for gain. For this purpose the territory of India has been divided into five zones – The northern, southern, eastern, western and central zone. Here zone means a zone specified in Sec. 15 of the States Reorganization Act, 1956. [**Explanation to Sec. 12(1)**]

- (1) The Northern Zone comprises the States of Haryana, Punjab, Himachal Pradesh, Rajasthan and Jammu & Kashmir, and the Union Territories of Delhi and Chandigarh.
- (2) The Central Zone comprises the States of Uttar Pradesh and Madhya Pradesh.
- (3) The Eastern Zone comprises of the States of Bihar, West Bengal, Orissa, Assam, Manipur and Tripura.
- (4) The Western Zone comprises of the States of Gujarat and Maharashtra, and the Union Territories of Dadra and Nagar Haveli and Goa, Daman & Diu.
- (5) The Southern Zone comprises of the States of Andhra Pradesh, Tamil Nadu, Karnataka and Kerala, and the Union Territory of Pondicherry.

Now, the Copyright Board functions in five zones. The Board discharges its functions through the Benches constituted by the Chairman, and the Chairman constitutes benches from amongst its members, each bench consisting of not less than three members. [**Sec. 12(2)**] If the matter of dispute is of utmost importance, the Chairman of the Board may constitute a bench consisting of five members. [**Proviso of Sec. 12(2)**] If there is any difference of opinion among the members of the Bench, the opinion of majority shall prevail. [**Sec 12(3)**] If there is no such majority, the opinion of Chairman will prevail. [**Proviso of Sec 12(3)**]

Further, the Chairman may authorize any of its members to exercise any of the powers conferred on it by provision of Sec. 74 of the Act and any order or act done in the exercise of these powers by the member so authorized will be deemed to the order or act, as the case may be of the Board. [**Sec. 12(4)**]

Also, no member of Copyright Board should take part in any proceedings before the Board in respect of a matter in which he has a personal interest. **[Sec. 12(5)]**

**Appeal (Sec. 71-73 of the Act):** An order of the registrar may be appealed within 3 months to the Copyright Board and any decision or order of the Board may be appealed to the High Court within 3 months.

No appeal lies against the order of the Copyright Board for the determination of issue related to the term of the copyright in other countries. **[Sec. 72]**

The jurisdiction of High Court in appeal is determined by the place where the appellant actually or voluntarily resides or carries on business or personally works for gain. Further, the word resides, refers only to natural person and not to legal persons like companies or government. This is why the firm or companies whether they carry on business at a particular place is a question of fact. **[Mohammad Kasim vs. Hanuman Industries; AIR 1956 J.C 200]**

Civil courts have no jurisdiction to rectify the copyright register. And the Copyright Board has no powers to limit the user of copyright to any particular territorial area. **[Vandana vs. Vandana saree Emporium; (1983) PTC 119]**

Further, **[In Mukherjee vs. State (1994) PTC 202]** it was held that while exercising its jurisdiction under section 19A relating to settlement of disputes arising out of assignment of copyright, the Copyright Board has no power to decide whether there was any infringement of copyright.

Hence, registrar functions as single arbitrator. And the appeals against his orders are made to the board. Thus, the mechanism under the Act is – administrative, quasi-judicial and judicial.

### **COPYRIGHT SOCIETIES**

Copyright Society is a legal body which protects or safeguards the interest of owners of the work in which copyright subsist. The Copyright Societies gives assurance to the creative authors of the commercial management of their works.

The authors of creative works licence a publisher to publish the work on a royalty basic. This also leads to infringement of the work anywhere in India or abroad therefore it is extremely difficult for the owner of the work to prevent from such infringement. To overcome such difficulty owners of Copyright works have formed Societies to licence their works for performance or communication to the public or issue copies of the work to the public. 'Copyright Society' means a society registered under Section 33 (3).

The Copyright societies are also authorized to watch out for infringement of the copyright and take appropriate legal action against the infringers.

### **FUNCTIONS OF A COPYRIGHT SOCIETY: The copyright Societies discharge the following functions:**

1. It grant license of the Copyright in the work for reproduction, performance or communication to public.
2. It locates the infringement of the Copyright and initiates legal proceedings.

To regulate these activities of such copyright societies Sections 33 to 36A have been enacted under the Copyright Act 1956.

### **STATUTORY PROVISIONS:**

Section 33(1) provides that no person or association of person allowed to carry on the business of issuing or granting licenses in respect of any work in which Copyright subsists or in respect of any rights conferred by the Act except under a registration.

However the owner of Copyright in his individual capacity will continue to have the right to grant licenses in respect of his own works with his obligation if any as a member of the registered Copyright Society.

An application may be made to the Registrar of Copyright. Every application should satisfy the conditions. And then the Registrar shall forward the application to the Central Government which may, having regard to the interests of the author and other owner of rights under this Act, the interest and convenience of the public and in particular of the group of persons who are most likely to seek licenses in respect of the relevant rights and the ability and professional competence of the applicants, register such association of persons as a Copyright Society subject to conditions as may be prescribed.

Central Government shall not ordinarily register more than one Copyright Society to do business in respect of the same class of works.

Section 33(4) states that the Central Government, if satisfied that the Copyright Society is detrimental to the interest of the owners of rights concerned. Then in this case the Central Government cancel registration of such society after such inquiry as may be prescribed.

**Conditions of the submission of applications for registration of Copyright Societies:** Any association of persons whether incorporated or not, consisting of seven or more owners of copyright (hereinafter referred to as 'Applicant') formed for the purpose of carrying of business of issuing or granting licenses in respect of any class of works which is copyrighted or in respect of any other work conferred by the Act. In this case they may file with the Registrar of Copyrights an application of Form II- C. The application then is submitted to the Central Government for grant of permission to carry on the business and for its registration as a Copyright Society.

An application under the above provision shall be signed by all the members of the Governing Body and the Chief Executive of the Applicant.

**Conditions for registration of a Copyright Society: According to Rule 14 B of the Copyright Rules, 1958:**

i. When an application for registration is submitted to the Central Government through the Registrar of Copyrights, the Government may, within sixty days from the date of its receipt by the Registrar of Copyrights either register the Applicant as a Copyright Society.

ii. The application shall be rejected if the following grounds are present, but only after giving the Applicant an opportunity to being heard:

a) The Applicant has no professional competence to carry on its business or has not sufficient funds to manage its affairs; or

b) There exists another Copyright Society registered under the Act for administering the same class of works and its functioning well; or

c) The Central Government has reason to believe that the members of the Applicant are not bonafide copyright owners or they have not voluntarily signed the instrument setting up the Applicant and the application for registration; or

d) The application is found to be incomplete in any respect, reject the applications.

i. After the registration of the Copyright Society by the Central Government, the Registrar of the Copyrights shall issue certificate of Registration in Form II- D under his hand and seal.

ii. On and from the date of its registration as specified in the Certificate of Registration, the Copyright Society shall be entitled to commence and carry on the permitted copyright business in the name by which it has been so registered.

**Procedure for holding inquiry: According to Rule 14 C of the Copyright Rules, 1958:** On the complaint of the Registrar or any of the owners of the rights, has reason to believe that a Copyright Society is being managed detrimental to the interests of the owners of rights concerned , it may after making an inquiry in the following manner, cancel or suspend the registration of the Copyright Society made there under these rules, namely The Central Government by sending a copy of the complaint to the society shall ask for a written statement of its defense within a specified time.

i. After receiving the written statement, the Central Government if satisfied that a prime facie case, it shall order an inquiry by appointing an Inquiry Officer.

ii. The Inquiry Officer shall conduct an inquiry based on the principles of natural justice.

iii. He take the assistance of other such as chartered accountant, an audit officer etc.

iv. On the basis of the report of the Inquiry Officer, the Central Government shall take action and if the complaints are found true, the Government shall cancel the registration of the Copyright Society.

**Suspension of Registration:** Under Rule 14 D of the Copyright Rules, 1958, the Central Government may suspend the registration of the Society and appoint an administrator. According to Rule 14 E administrator has powers to administer the Copyright Society.

**Cancellation of registration:** Rule 14 F of the Copyright Rules, 1958, the registration of the Copyright Society as such may be cancelled by the Central Government

i. If any of the particulars furnished in the application for registration is found to be false.

ii. Or if the society is being in a manner detrimental to the interests of the owners of rights concerned.

iii. Or if it fails to maintain its accounts and get them audited persistently.

iv. Or it utilizes its fund for purposes other than the copyright.

**Power of copyright Society:** According to Section 34 (2),

(a) A Copyright Society may accept from an owner of the rights exclusive authorization to administer any right in any work by issue of licenses or collection of license fees or both.

(b) The owner of rights has the right to withdraw such authorization without prejudice to the rights of the Copyright Society under any contract, subject to certain conditions prescribed.



The Copyright Society may also enter into any agreement with any foreign society or organization administering rights corresponding to rights under the Act to entrust to such Society or organization the administration in any foreign country of rights administered by the said Copyright Society in India and vice versa. This is subject to the condition that there is no discrimination in regard to the terms of licenses or the distribution of fees collected between rights in Indian and foreign works.

**Subject to such conditions as may be prescribed the Copyright Society has the following power:**

- i. To issue licenses under Section 30 in respects of any rights under the Act.
- ii. To collect fees in pursuance of such licenses.
- iii. To distribute such fees among owners of rights after making deductions for its expenses.
- iv. To perform any other functions consistent with the provision of Section 35 i.e.; control over the Society by the owner of rights.

**Rights and liabilities of the Performing Right Societies:** This provision relating to Copyright Societies will not affect any rights or liabilities in any work in connection with the Performing Right Society which has accrued or were incurred on or before the day prior to the commencement of the Copyright Act, 1994 or any legal proceedings in respect of rights and liabilities on that day. (Section 36).

**Accounts and Audit:** Every Copyright Society must maintain proper accounts and other relevant records and prepare an annual statement of accounts.

They have to maintain the accounts in the form and the manner as prescribed by the Central Government in consultation with the Comptroller and Auditor General.

The accounts of each Copyright Society in relation to the payments received from the Central Government will be audited by the Comptroller and the Auditor General of India.

And if expenses incurred in connection with such audit, then it will be payable by the Copyright Society to the Comptroller and the Auditor General.

The Comptroller and the Auditor General or any other person appointed by him in connection with the audit of accounts has the right to demand the production of books, accounts and other documents and papers and to inspect any of the officers of the Copyright Society for the purpose only of such audit.

The accounts of each of the Copyright Societies as certified by the Comptroller and Auditor General together with the Central Government who shall cause the same to be laid before each House of Parliament.

As per Rule 14 M of the Copyright Rules, 1958, Every Copyright Society shall maintain proper accounts of the fees and royalties collected in a financial year, payments made out of such collections to the owners of rights and other expenditure incurred for meeting administrative expenses and related matters with the approval of the owners or rights. However, a Copyright Society shall not spend more than fifteen percent of its collection towards its administrative expenses.

Every Copyright Society shall get its accounts audited by a Chartered Account annually.

**Q. Why registration is not necessary under the Copyright Act of India? Explain the procedure of registration under the said Act**

Copyright comes into existence as soon as a work is created and no formality is required to be completed for acquiring copyright protection. India is a member of the Berne Convention as well as the Universal Copyright Convention. Therefore, work created in other member states is accorded protection in India as well. Registration of copyright is not mandatory. However, it is advisable to apply for Registration of Copyright as the certificate of registration of copyright and the entries made therein serve as prima facie evidence in a court of law with reference to dispute relating to ownership of copyright. It also makes the process of licensing and/ or assignment of the registered work much easier. In the case of **Asian Paints (I) Ltd. Vs Jaikishan Paints & Allied Products, 2002 (6) Born CR 1** the High Court of Bombay has observed: "Registration under the Copyright Act is optional and not compulsory. Registration is not necessary to claim a copyright. Registration under the Copyright Act merely raises a prima facie presumption in respect of the particulars entered in the Register of Copyright. The presumption is however not conclusive. The Copyright subsists as soon as the work is created and given a material form even if it is not registered".

In the case of **International Association of Lions Clubs Vs National Association of Indian Lions, 2006 (33) PTC 79 (BOM) 91** the same Court held that registration thereof, is only a prima facie evidence of an ownership of such a copyright and Design.

**NON-COMPULSORY REGISTRATION:** Section 44 of the Copyright Act, 1957 provides for registration of a work in which copyright subsists but it is not necessary to claim copyright. Copyright sunbursts as soon as the work is created and given a material form.

In **R.G. Anand's Case, AIR 1978 SC 1613** the Supreme Court rejected a contrary view which had been taken by a Division Bench of the Madhya Pradesh High Court terming it as being 'wrongly decided'. It was the case of **Mishra Bandhu Karyalaya Vs Section Kosha, AIR 1970 MP 261** in which the High Court held that: "under the Act of 1957, the registration of the work with the Registrar of Copyright is a condition precedent for acquiring copyright in respect of it, and that the author has no right or remedy unless the work is registered."

The Apex Court held to the contrary, that registration of works is not mandatory for availing copyright protection. **(AIR 1978 SC 1613)** Therefore, through the catena of cases, the Courts in India have upheld the principle of 'automatic protection' and that registration is not a condition prerequisite for availing copyright protection which inheres in the work upon its creation from the mind and manifestation in a tangible medium. Section 45 of the Copyright Act, 1957 read with Rule 16 of The Copyright Rules, 1958 prescribes detailed procedure for registration of copyright in India. The Copyright is conferred only upon authors or those who are natural person from whom the work has originated, or the authors may be legal persons to whom copyright has been assigned in accordance with law, by the authors from whom the work had originated, **Camlin Pvt. Ltd. Vs National Pencils Industries, AIR 1988 Delhi 393.**

**Procedure for registration:**

Chapter VI of the Copyright Rules, 1956 sets out the procedure for the registration under the Copyright Act. The procedure for registration is as follows:

- a. Application for registration is to be made on Form IV ( Including Statement of Particulars and Statement of Further Particulars) as prescribed in the first schedule to the Rules ;

- b. Separate applications should be made for registration of each work;
- c. Each application should be accompanied by the requisite fee prescribed in the second schedule to the Rules ; and
- d. The applications should be signed by the applicant or the advocate in whose favour a Vakalatnama or Power of Attorney has been executed. The Power of Attorney signed by the party and accepted by the advocate should also be enclosed.

Each and every column of the Statement of Particulars and Statement of Further Particulars should be replied specifically.

Both published and unpublished works can be registered. Copyright in works published before 21st January, 1958, i.e., before the Copyright Act, 1957 came in force, can also be registered, provided the works still enjoy copyright. Three copies of published work may be sent along with the application.

If the work to be registered is unpublished, a copy of the manuscript has to be sent along with the application for affixing the stamp of the Copyright Office in proof of the work having been registered. In case two copies of the manuscript are sent, one copy of the same duly stamped will be returned, while the other will be retained, as far as possible, in the Copyright Office for record and will be kept confidential.

Also it would also be open to the applicant to send only extracts from the unpublished work instead of the whole manuscript and ask for the return of the extracts after being stamped with the seal of the Copyright Office.

When a work has been registered as unpublished and subsequently it is published, the applicant may apply for changes in particulars entered in the Register of Copyright in Form V with prescribed fee.

### **Steps for Copyright Registration**

**Step 1: Filing the Application:** Along with the requisite fee, an application needs to be submitted either in DD/IPO. Once this application is filed, a diary number is generated and issued to the applicant.

**Step 2: Examination:** There is a minimum wait of 30 days for recording and analysing any objections that may come up against the copyright application

**a. In case of no Objection:** The application goes ahead for scrutinization by an examiner. This scrutiny gives rise to two options:

**1. In case of discrepancy found during scrutiny:** A letter of discrepancy is sent to the applicant letter is generated and sent to the applicant.

Based on the reply from the applicant, the registrar conducts a hearing of the alleged discrepancy row

Once the discrepancies are sorted during the hearing, the extracts of the same are sent to the applicant for him/her to register the copyright

**2. In case of zero discrepancy:** This would mean that the copyright application fulfils all criterion required for the copyright. The applicant is then given the nod to go ahead with the registration of the same. (If the registration is not approved, then the applicant received a letter of rejection)

**b. In case of an objection filed:** While we listed above the scenarios of 'no objections', in case one is faced with an objection, the following proceedings take place:

Authorities send out letters to the two concerned parties, trying to convince them to take back the objection

After requisite replies from the third party, the registrar conducts a hearing

Depending on whether the registrar accepts the reply, the procedure takes shape

**1. If the application is accepted:** The application being accepted means that the objection has been rejected. The application goes ahead for scrutinization by an examiner. This scrutiny gives rise to two options:

**2. In case of discrepancy found during scrutiny:** A letter of discrepancy is sent to the applicant letter is generated and sent to the applicant.

Based on the reply from the applicant, the registrar conducts a hearing of the alleged discrepancy row

Once the discrepancies are sorted during the hearing, the extracts of the same are sent to the applicant for him/her to register the copyright.

**c. In case of zero discrepancy:** This would mean that the copyright application fulfils all criterion required for the copyright. The applicant is then given the nod to go ahead with the registration of the same. (If the registration is not approved, then the applicant received a letter of rejection)

**d. If application is rejected:** In case this happens, then the applicant receives a rejection letter that marks the end of the copyright procedure

**Step 3: Registration:** As can be seen from the aforementioned steps, the registration solely depends on the registrar. Once everything is cleared from the registrar's end, the applicant received the copyright and can legally exercise all rights that come with the owner of that copyright.

**Some of the advantage of Registration are:**

- Registration establishes a public record of the copyright claim.
- Before an infringement suit may be filed in court, registration is necessary for works.
- Registration establishes sufficient evidence in court concerning the validity of the copyright and the facts stated in the copyright certificate.
- If registration is made, statutory damages and attorney's fees will be available to the copyright owner in court actions. Otherwise, only an award of actual damages and profits is available to the copyright owner.
- Registration allows the owner of the copyright to record the registration with the Indian Customs for protection against the importation of infringing copies.

**Q. When copyright is deemed to be infringed? "Certain Acts not to be infringement of Copyright" - Discuss. Discuss the remedies available against the Infringement of copyright under the Copyright Act 1957. Justify in your own words the role played by the judiciary in this regard.**

In dealing with copyright, we should bear in the mind that copyright does not protect novelty but only originality. Copyright protects only the expression and not the idea. Therefore, if it is the only method of expressing the work,

it cannot be protected. Best example would be the Telephone Directory wherein the Name, Address, Phone No. are given and also given in alphabetical order. There can be no other way of expressing the same. Therefore, this would not amount to copyright infringement. This is popularly referred to as Idea-Expression Dichotomy.

The key factors required for initiating any infringement case are:

- Prove ownership of Copyright
- Infringer has copied (Substantially Similar)

Once the rights of the owner have been established, the next step is to prove that there is an actual infringement. If the defendant makes copies of a copyrighted work and commercially exploits such copies or any blatant infringement, nothing further needs to be proved to establish infringement apart from what has been discussed above. However, more complicated

questions arise when the defendant the alleged infringing work involved relates to something, which is similar, but not identical with the plaintiff's work. In such cases, in order to prove infringement, the plaintiff must show the following, (*Arnstein v. Porter, 154 F.2d 464*)

- a. The defendant **copied** directly from the plaintiff's work, and
- b. The elements copied, when taken together, amounts to an **improper appropriation**.

Realizing that direct evidence of copying will be rarely available, courts have universally allowed copyright owners to prove copying on the basis of circumstantial evidence, specifically through inferences from the defendant's **access** to the plaintiff's work and from any similarities between two works.

In the case of *Super Cassette Industries Vs Nodules Co. Ltd .*, the defendant played cassette in Hotel amounts to copyright infringement. This was clearly held to be act of infringement of author's right over copyright.

Copying can, therefore, be proved by **inference**. It can be inferred that the defendant has in fact copied the plaintiff's work from the fact that the defendant had access to the plaintiff's work and from the similarities between his work and that of the plaintiff's. The rationale behind this is that given the sufficient opportunity that the defendant had to copy the plaintiff's work in addition to the striking similarity between the two works, the evidence in hand is indicative of copyright infringement.

In the case of *Roma Mitra Vs State of Bihar*, the Plaintiff, a student gave the work to the guide. The guide published the work as her own. The published article was substantially similar and therefore, amounted to copyright infringement.

In the case of *Ty Ink Vs GMA Accessories, 959 F.Supp. 936 (1997), 132 F.3d 1167 (7th Cir. 1997)* it was held that Similarity between works is highly unlikely to have been in accident of independent creation. This is an evidence of access.

Therefore, there is a reciprocal relationship between *proof of access* and *similarity* and this relationship is subject to two important limitations (*Arnsteinv. Porter, 154 F.2d 464*):

In the case of *S.K. Dutt vs Law Book Co. And Ors., AIR 1954 All 570* the court determined the amount of substantiality should be more than half of the total work. It has also held that where the half of the work is copied and the remaining being original work, it does not constitute infringement.

- a. "If there are no similarities, no amount of evidence of access will suffice to prove copying".
- b. "If evidence of access is absent, the similarities must be so striking as to preclude the possibility that plaintiff and the defendant arrived at the same result."

Therefore, to summarise the Condition to prove infringement can be summarized as follows:

- a. Closely Similarity      b. Unlawful      c. Some connection      d. Access to original work

### **TESTS APPLIED**

**The Protected Expression Test:** The first test for improper appropriation is to identify whether the defendant's work copies any protected expression from the plaintiff's work, i.e., exclude those elements from the plaintiff's work, which are not protectable under law. Examples of such elements are expressions to which the Idea-Expression Doctrine applies or the doctrine of "*Scenes a faire*" applies. This arises in situations where the idea and expression merge and since copyright law does not protect ideas per se, that element is not protected under copyright. Also, this relates to those elements, which necessarily have to be present in any form of expression of an idea and hence, not protected under copyright. The Court first separates these elements from the work that is alleged to be copied.

Of course, in reality, the most difficult task is to determine the point at which the unprotectible ideas in a copyrighted work end and where the protected expression starts. In ***Nichols v. Universal Pictures Corp.* 45 F.2d 119**, Judge Learned Hand held that

*"When the plagiarist does not take out a block in situ, but an abstract of the whole, decision is more troublesome. Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended."*

Therefore, if the idea can be expressed only in a particular method, it cannot be protected under the copyright law. Best example would be the Telephone Directory wherein the Name, Address, Phone No. are given and also given in alphabetical order. There can be no other way of expressing the same. Therefore, would not amount to copyright. But even in these works, if the work has been found to have been copied by the defendant, then the court may grant injunction and other remedial measures as the author has put his labour to do the said work. Generally, in these cases, the court would restrict the use of the available information for 3-4 years or any number of years as the case may be, that would be required to generate the information. For example, for the acquiring the names, address and phone numbers of the local people in a place, a person may require 1-2 years of time to acquire the information which he has copied from the existing phone book. Then the court may restrain the defendant for the period of 1-2 years from publishing the said work.

In the case of ***20<sup>th</sup> Century Fox Interstate Ltd Vs Zee TV Ltd.*, I.A Nos.4776, 4777/2005 in C.S (OS) No.868/2005** the plaintiff and the defendant were in the same kind of business i.e TV shows which was copied by the defendant. The court held that this does not amount to infringement as it comes under Idea-Expression Dicotomy and there is no other way of expressing the idea. It was also held that mere outline of copyright is not copyrightable except being distinct.

In the case of ***Campbell Vs Acuff Ross Music Inc., 510 U.S. 569 (1994)*** the plaintiff composed a song that begins with “Oh, Pretty Women” which became very famous. The defendant copied the famous 1st line of the song alone and completed the song in his own words and expression. The court held that the act did not constitute infringement.

In the case of ***The University of Oxford and Ors. Vs. Rameshwari Photocopy Services and University of Delhi (CS(OS) 2439/2012)*** famously known as ***Rameshwari Photocopy case*** or the ***Delhi Photocopy case***, wherein the Delhi University compiled the required portion from the books of Oxford, Cambridge and Taylor & Francis and distributed to its students. Infringement suit was filed by publishers Oxford University Press, Cambridge University Press and Taylor & Francis. The issue here is the University copied the copyrighted work and thereby the infringed but on the other hand, it was issued to the students (for academic purpose) which comes under the fair dealing but for a consideration which may not be acceptable under the fair use. The case is before the court and is yet to be decided by the Courts of law.

**Audience Test:** To establish infringement, the plaintiff should demonstrate that any audience would find the expression in the defendant’s work substantially similar to the plaintiff’s work. Courts sometimes refer to this test as an “audience test “ and sometimes as an “ordinary observer” test. This principle of test is from the prospective of a third person, or a layman, the two works should be seem so substantially similar that a layman they would not be able to distinguish between the two.

**Contributory Infringement:** Contributory infringement is where the copyrighted work is duplicated by another person without the consent of the owner or existence of any lawful excuse by another with the aid of another. This may be simply put a abetment to an offence. For example, a person has a Rs.1000 note and takes a color Xerox in a shop. The person is an infringer and the Xerox shop is abettor or the person who commits contributory infringement.

Similarly, where a book or compact disc is copyrighted which can be easily ascertained, any person who helps in the offence of infringement like making duplicates copies, translation, adaptation, communication to public etc, would amount t contributory infringement.

In the ***A&M Records, Inc. v. Napster, Inc. 239 F.3d 1004 (2001)***, the Defendant maintained a central unit which enabled two or more remote computers to share all the music files in other system. The defendant was held vicariously liable and for contributing to the infringement.

In the case of ***Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417 (1984)***, the Supreme Court of the United States which ruled that the making of individual copies of complete television shows for purposes of time shifting does not constitute copyright infringement though the lower courts considered it to be a contributory infringement, but it is only a fair use.

**Acts which may not amount to Infringement:** The act/ copying by defendant may not always amount to infringement. Some examples of acts which do not constitute Infringement under the Copyright Act are as follows:

- Fair dealing such as criticisms, personal use, newspaper report, review etc.
- Adaptation of Computer Program
- Judicial Proceedings
- Exclusive work of member of House of Legislature
- Non-Corporate matter for institution purpose
- Question Papers

- With Consent
- Non-paying Audience
- Issue being Current Topic such as economic, social, political Etc.
- Made less than 3 copies
- Research or Private study
- Available in Official Gazette.
- Report of committee or Commission
- After the expiry of Copyright.

### **Fair Use**

For the purpose of deciding fair use of the work, the following factors has to be taken into consideration before determining it to be an copyright Infringement.

- a. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- b. the nature of the copyrighted work;
- c. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- d. the effect of the use upon the potential market for or value of the copyrighted work.

At the outset, it should be mentioned that the “Fair Use” of the work depends upon facts and circumstances of each case. In a copyright infringement case dealing with fair use, the duty of the court is to first determine whether the defendant has use the copyrighted information in a natural or justifiable manner or has taken advantage of already existing work of the plaintiff. In deciding that, the court has to deal with the above mentioned factors before coming to any conclusion.

The purpose and character of the use plays a major role in determining the copyright infringement. If the defendant has used it for a purpose which is justifiable or excusable under the Copyright Act, it may not constitute infringement. It is important that the each fact is weighted properly in deciding fair use.

For example, if a person writes a book on topic “Mother’s care” and gets his book copyrighted and subsequently, another person with title “Mother’s care” writes an article on mother’s care on child. Under ordinary circumstances, it may be an infringement, but here it is just an article on care of mother towards the child to an non-paying audience with no commercial element involved in it. Therefore, it would be come under fair use not amounting to infringement. In the case of ***Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985)***, Former President Gerald Ford had written a memoir including an account of his decision to pardon Richard Nixon. Ford had licensed his publication rights to Harper & Row, which had contracted for excerpts of the memoir to be printed in *Time*. Instead, *The Nation* magazine published 300 to 400 words of verbatim quotes from the 500-page book without the permission of Ford, Harper & Row, or *Time* magazine. *The Nation* asserted as a defense that Ford was a public figure, and his reasons for pardoning Nixon were of vital interest, and that appropriation in such circumstances should qualify as a fair use. The court ruled that fair use is not a defense to the appropriation of work by a famous political figure simply because of the public interest in learning of that political figure's account of an historic event.



As stated before, the concept of fair use come into play once the act of the defendant is justifiable or is excusable under the law. In the case of ***Eastern Book Company Vs D.B.Modak, AIR 2008 SC 809*** the plaintiff reported the judgments of the courts along with a head notes giving synopsis of the judgment. Question arose as to whether judgment can be given copyright to an individual who reported the judgment. The court held negatively and held that head notes alone were eligible for copyright and not the judgment.

Secondly, the nature of use by the defendant is very crucial in determining the liability of the defendant. If the defendant uses the subject matter of the copyright that exploitative of the plaintiff work, it would be infringement. Also if the defendant uses the copyrighted work in a manner that defame or derogates the author or his work, it would amount to infringement.

In ***Phoolan Devi v. Shekhar Kapoor, 1995 (32) DRJ 142***, the plaintiff claimed that the basis of the film, being a novel dictated by the illiterate plaintiff herself had been considerably mutilated by the film producer. The plaintiff sought a restraint order against the defendant, from exhibiting publicly or privately, selling, entering into film festivals, promoting, advertising, producing in any format or medium, wholly or partially, the film “Bandit Queen” in India or elsewhere. Granting an injunction, held that “the defendant had no right to exhibit the film as produced violating the privacy of plaintiff’s body and person. The balance of convenience is also in favour of restraining the defendants from exhibiting the film any further as it would cause further injury to the plaintiff. No amount of money can compensate the indignities, torture, and feeling of guilt and shame which has been ascribed to the plaintiff in the film. Therefore, the defendants were refrained from exhibiting the film in its censored version till the final decision of the suit.”

In ***Smt. Mannu Bhandari, Appellant v. Kala Vikas Pictures Pvt. Ltd. and another, AIR 1987 Delhi 13***, the court observed that “section 57 lifts the author’s status beyond the material gains of copyright and gives it a special status. An author’s right to restrain distortion etc. of his work is not limited to a case of literary reproduction of his work. The restraint order in the nature of injunction under section 57 can be passed even in cases where a film is produced based on the author’s novel. The language of section 57 is of the widest amplitude and cannot be restricted to ‘literary’ expression only. Visual and audio manifestations are directly covered. The court observed that by reading the contract with section 57, it is obvious that modifications, which are permissible, are such modifications, which do not convert the film into an entirely new version from the original novel. The modifications should also not distort or mutilate the original novel. The fact that Mannu Bhandari is the author of the story will be published in all the credits. This is for giving due recognition to the author’s reputation.” The court therefore, directed certain modifications and deletions to the film before screening it.

In cases of factual matters, there cannot be much of infringement except where they are literally copied as the facts per se cannot be copyrighted and copying the same is justifiable act. For example, News cannot be said to have been copied by another. The case is also applicable to factual matter or scheme or the scene of an individual. One must bear in mind that copyright does not protect idea but only the expression. For example, a person writes a story and another person copies the story with same number of persons, their characters, situation etc but in his own words. This would not amount to infringement as the expression is not copied here.

The Supreme Court’s decision in ***R.G.Anand v. Delux Films, 1978 AIR 1613***, would show that infringement in India is normally established through comparison of the two works from a holistic perspective. Although the said decision does specifically state, for instance, that ideas *per se* are not protectable, the similarity in the ideas between the two works involved in that case seems to have been a factor that the Court considered. Therefore, the law in India prescribes more of a total “look and feel” or the “**Lay Observer Test**” of the work involved, as seen from the perspective of a layman.

Again, if the subject matter is copied by the defendant making substantial changes to the original work or modifies the original work to suit the targeted audience, it may not be an act of infringement. For example, the book 'Five point someone' was transformed into a Hindi movie named 'Three Idiots'. Again the same was translated to Tamil by the name 'Nanban'. All of these does not constitute infringement as some changes were made to suit the interest of the targeted audience by the copier and therefore, this work becomes a original work.

If the author creates any fictional stories and it is copied by the defendant, it may be a blatant copying of the author's work leading to infringement. But, if the copying is of the kind that may naturally occur in the course, it may not be an infringement. For example, hero or heroine of the film introduced with the song cannot be copyrighted. This is called as scenes affair Doctrine.

Also, it is of utmost important that the act of the defend causes some effect upon the author. If the act of the defendant deteriorates the reputation of the author or the defendant by copying the authors work becomes the competitor of the author covering the targeted audience or by any other way affects the rights available under the Copyright Act, the act of the defendant would constitute infringement under the Copyright Act. Some of the defenses available for the defendant are as follows:

- Not Copyrightable
- Consent
- Public Interest
- Permitted acts
- Fair Dealings
- Education
- Libraries and Archieves
- Computer programs
- Adaptation
- Statutory License etc.

In the case of **Hubbard v. Vosper, (1971) 1 All E.R. 1023** the court held as under: *"It is impossible to define what is 'fair dealing.' It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions.... Other considerations may come to mind also. After all is said and done, it must be a matter of impression...."*

Therefore, there cannot be straight line jacket in determining infringement or fair use by the defendant. It is must be decided on case to case basis only based on facts and circumstances of each cases before the court.

### **Computer Programs**

In India, the Intellectual Property Rights (IPR) on computer software is also covered under the Copyright Law unlike US where the computer programs are given patent protection. Accordingly, the copyright of computer software is protected under the provisions of Indian Copyright Act 1957. Major changes to Indian Copyright Law were introduced in 1994 and came into effect from 10 May 1995. These changes or amendments made the Indian Copyright law one of the toughest in the world.

The amendments to the Copyright Act introduced in June 1994 were, in themselves, a landmark in the India's copyright arena. For the first time in India, the Copyright Law clearly explained:

- The rights of a copyright holder
- Position on rentals of software
- The rights of the user to make backup copies

Since most software is easy to duplicate, and the copy is usually as good as original, the Copyright Act was required. Some of the key aspects are as follows:

- According to section 14 of this Act, it is illegal to make or distribute copies of copyrighted software without proper or specific authorization.
- The violator can be tried under both civil and criminal law.
- A civil and criminal action may be instituted for injunction, actual damages (including violator's profits) or statutory damages per infringement etc.
- Heavy punishment and fines for infringement of software copyright.
- Section 63 B stipulates a minimum jail term of 7 days, which can be extended up to 3 years.

In the case of ***Whelan Associates Inc. v. Jaslow Dental Laboratory, Inc.*** 97 F.2d 1222, 230 USPQ 481, the plaintiff and the defendant had the same output but through different process. This was done through different programming language. The court considered it as an infringement and protected the Structure, Sequence and Organization (SSO)

In certain cases, just by running the program, the person in the field would be able to under the ingredient and the programs in it commonly referred to as Black Box Test.

Subsequently in the case of ***Computer Associates International, Inc. v. Altai, Inc.*** 982 F.2d 693 (2d Cir. 1992) the court overruled Vellian's Case and came up with three tier test to be applied for determining the software copyright infringement.

- Abstraction
- Filtration
- Comparison

From the above ruling, the court must first break down the program alleged to be infringing into its constituent structural parts, thus segregating the ideas from the expressions through *abstraction*. Then, by examining each of these expressions for exceptions such as the Merger Doctrine, accounting for an expression that is necessarily incidental to those ideas, and other expressions which are public knowledge and are openly available in the public domain, a court would thereafter be able to *filter* out all non-protectable material. Left with the kernel(s) of creative expression after following this process of elimination, the court's last step would be to *compare* this material, protected by copyright, with the allegedly infringing program. This would involve something similar to the test of 'substantial similarity' discussed above. On the whole, one may clearly see the similarities between the test laid down in the Altai case and the original tests followed in the context of other works.

Recently, the government of India has come with an idea of protecting Computer Aided Software (CAD) under the patent laws. Here the government wishes to protect the software not with copyright law but with Patent laws so as to encourage the innovation on software development. As reiterated in previous paragraphs, the copyright protects only the expression and many concepts such as Structure, Sequence and Organization crops up. But this does not in any way protect the creator's inventive or innovative thought. Also under the Patents Act, a Computer Program *per se* cannot be patented. Therefore, the software *per se* is not given the patent rights but software that is made specifically in relation to a hardware would be protected under the Patents Act.

This law is under the developmental stage and has not yet seen the light of the day. We may wait for the law to come and the trial and error method would be the best method for the any laws of these kinds. From the outline, it seems to put an end to the highly controversial topic of providing software with copyright or patent protection.

### **REMEDIES OF COPYRIGHT INFRINGEMENT**

**CIVIL REMEDIES :** The most important civil remedy is the grant of interlocutory injunction since most actions start with an application for some interlocutory relief and in most cases the matter never goes beyond the interlocutory stage. The other civil remedies include damages - actual and conversion; attorney's fees, rendition of accounts of profits and delivery up.

**INTERLOCUTORY INJUNCTIONS:** The principles on which interlocutory injunctions should be granted were discussed in detail in the English case of *American Cyanamid v Ethicon Ltd*<sup>31</sup>. [1975] AC 368 (HL(E)). After this case, it was believed that the classic requirements for the grant of interim injunction are:

- Prima facie case
- Balance of Convenience; and
- Irreparable injury

In the case of *Series 5 Software Ltd. v Philip Clarke & Others*, [1996]FSR 273 Laddie J re-examined the principles and took a fresh look at what Cyanamid had actually decided. The learned judge held :

- The grant of an interlocutory injunction was a matter of discretion and depended on all the facts of the case;
- there were no fixed rules;
- the court should rarely attempt to resolve complex issues of disputed fact or law;
- major factors the court should bear in mind were (i) the extent to which damages were likely to be an adequate remedy and the ability of the other party to pay (ii) the balance of convenience (iii) the maintenance of the status quo, and (iv) any clear view the court may reach as to the relative strength of the parties' case.

Thus, this case places emphasis on the merits and the effect may well be to obtain a non-binding view by a judge on the merits. This may lengthen the hearing of application for interlocutory injunction as parties may lead evidence on the merits but it may have the overall effect of putting an early end to the main action.

**PECUNIARY REMEDIES:** Under the Copyright laws of some countries like the United Kingdom, it is essential for the plaintiff to elect between damages and an account of profits although in the two recent cases,

namely *Baldock v Addison* [1994] FSR 665 and *Island Records v Tring International Plc* [1995] FSR 560, the Court held that there could be a split trial and a procedure could be adopted by which the trial could be divided so that once liability has been established, thereafter the plaintiff would be able to seek discovery in order for him to make an informed decision on which of the two of the remedies to elect, namely damages or account of profits. In *Cala Homes (South) Ltd. v Alfred McAlpine Homes East Ltd* [1995] FSR 818, Laddie J held that additional statutory damages could be granted even where the plaintiff elected for account of profits.

Under Sections 55 and 58 of the Indian Copyright Act, 1957, the plaintiff can seek the following three remedies, namely

- account of profits
- compensatory damages and
- conversion damages which are assessed on the basis of value of the article converted.

**ANTON PILLER ORDER:** The Anton Piller Order derives its name from a Court of Appeal decision in *Anton Piller AG vs Manufacturing Processes, [1976] Ch 55*.

An Anton Piller is a form of mandatory injunction which allows for search and entry into a defendant's premises which can be granted at any time, before or after judgement is given.

An Anton Piller when granted, allows the plaintiff to enter the premises of a defendant in order to search for articles and documents kept in the said premises and to inspect them physically and to even remove them for safe-keeping.

The 'element of surprise' is a key factor in this instance as it prevents the potential destruction or concealment of materials which may be relevant in any pending or intended litigation that an Anton Piller order is usually obtained.

An Anton Piller order may be granted at any stage of an action. It is flexible and it may even be granted before the issuance of the writ of summons and in some cases it may even be granted after judgment and solely for the purpose of aiding execution. An Anton Piller order must be expressed in clear and unambiguous terms and if the defendant disobeys the order, he or she will be in contempt of court.

Considering that an Anton Piller injunction is only granted in the most exceptional of circumstances, the plaintiff must show that there is a valid cause of action. The essential prerequisites to be met before an application for an Anton Piller order is allowed are briefly as follows:

the plaintiff must show that it has a very strong prima facie case

the plaintiff must show that the actual or potential damage to it is very serious and

there must be clear evidence that the defendants possessed vital material which they might destroy or dispose of so as to defeat the ends of justice

In exceptional situations, courts may allow an ex parte application for an Anton Piller order to be made without notice to the defendant. The procedural requirements for an ex parte application are generally similar to that of a standard inter partes interlocutory injunction. In applying for an ex parte Anton Piller injunction, the applicant must make full and frank disclosure of all the material facts surrounding the case.

To avoid abuse of an Anton Piller order, safeguards are in place to ensure that the order is carried out in a peaceful and orderly manner. Non-compliance of any of the procedural safeguards as listed in the order may render it void and is incapable of being remedied by subsequent compliance. Briefly, the procedural safeguards are as follows:

- the order usually contains a term that before complying with the order the defendant is afforded the opportunity of obtaining legal advice, provided this is done forthwith
- the order itself should be permitted to be executed only on working days in office hours, when a solicitor can be expected to be available
- unless this is seriously impracticable, a detailed list of the items being removed should be prepared at the premises before they are removed, and that the defendant should be given an opportunity to check this list at the time
- Anton Piller orders frequently contain an injunction restraining those on whom they are served from informing others of the existence of the order for a limited period

- unless there is good reason for doing otherwise, the order should not be executed at business premises save in the presence of a responsible officer or representative of the company or trader in question
- service of the order is to be effected by a solicitor and not merely a representative and/or agent of the plaintiff
- service of the order must be effected in the presence of a Supervising Solicitor who is an independent party with the requisite experience in the operation of search orders
- upon the conclusion of the search, the Supervising Solicitor shall provide a report on the execution of the order

**MAREVA INJUNCTION:** Mareva Injunction is an order which temporarily freezes assets of a defendant thus preventing the defendant from frustrating the judgment by disposal of such assets. Prior to the inception of freezing or more commonly referred to as Mareva Injunctions, the fact that one could not 'get an injunction to restrain another from parting with his or her property' created scope for rampant abuse. What seemed to be the trend was that foreign companies, to evade possible adverse judgements, often would remove their assets from the court's jurisdiction before the commencement of trial. As a result, the plaintiff was left holding nothing more than to put loosely, a 'paper judgement'.

Mareva Injunctions are essentially a species of interlocutory injunction which seeks to restrain a defendant (personally or through his or her agent) from dealing, removing and/or disposing assets which may be necessary to meet a plaintiff's claim. In essence, it is a preventive relief which restrains a defendant who has assets within the jurisdiction of the court from dissipating those assets before a judgement can be obtained.

The main objective of a Mareva Injunction is to prevent the defendant from dissipating assets to defeat an order or judgement granted by the court. However, given the potentially draconian effects it may possibly have on a Mareva defendant, the courts have time and time again asserted that the remedy is not intended to give a plaintiff priority over those assets or to enable a plaintiff to exert pressure on a defendant to settle an action.

**Elements to be satisfied:** Essentially as with any other interlocutory injunctions, the fundamental elements that a plaintiff needs to establish in order to obtain a Mareva order are that there exists a serious question to be tried, ie a prima facie case; and the balance of convenience tilts in his or her favour as opposed to the defendant's.

The plaintiff must show that he or she has a good arguable case: To show a good and arguable case, the plaintiff merely needs to show a case which is more than being barely capable of serious argument, but not necessarily one that the judge believes has got more than 50% chance of success.

It would be sufficient for an applicant to show on evidence that there is a fair chance that the plaintiff will obtain judgement against the defendant. There is no need for the plaintiff to prove a strong prima facie case nor that a summary judgement ought to be granted in those circumstances.

If a plaintiff has already successfully obtained judgement, he or she would only need to show that there is a risk of dissipation of assets. In the case of a post-judgement application for a Mareva Injunction, the application would not be allowed if the plaintiff has not shown any attempt and/or effort to enforce the judgement which he or she has successfully obtained.

The defendant must have assets within the jurisdiction: It is axiomatic that in order for a Mareva Injunction to set in, the plaintiff must first demonstrate to the satisfaction of the court that the defendant has assets within the jurisdiction to which the said freezing injunction can latch on to. In most cases, the plaintiff would readily be in possession of information pertaining to the defendant's assets prior to the filing of a Mareva Injunction.

There must be a risk of dissipation of the defendant's assets: The third and perhaps most crucial element that the plaintiff must satisfy the court on is that there is a real risk or danger that the defendant's assets may be dissipated before judgement can be obtained.

An important question that a study of the jurisprudence of the Mareva Injunction raises is—how does one determine 'real risk of dissipation of assets'? The courts have taken divergent views on this and it is safe to say that there is no clear answer in this regard.

One view is that some concrete evidence to show that the defendant intends to evade the consequences of an adverse order by removing his or her assets has to be provided. Then there are judgements that state that merely showing 'a risk of disposal of assets which has the effect of frustrating the plaintiff in his or her attempt to recover the fruits of a judgement he or she is likely to obtain against the defendant' would be sufficient.

Some courts have gone further and stated that risk of dissipation of assets can be gauged from the nature of allegation and past behaviour of the defendant including the defendant's dishonest conduct if any, prior to the commencement of the suit.

**NORWICH PHARMACAL ORDERS:** These orders are made to ascertain information from third parties to enable the plaintiff or the defendant to produce evidence before the courts of law. A Norwich Pharmacal order is a court order for the disclosure of documents or information that is available in the United Kingdom. It is granted against a third party which has been innocently mixed up in wrongdoing, forcing the disclosure of documents or information. By identifying individuals the documents and information sought are disclosed in order to assist the applicant for such an order in bringing legal proceedings against individuals who are believed to have wronged the applicant.

A Norwich Pharmacal order was first granted in 1974 by the House of Lords in *Norwich Pharmacal Co. v Customs and Excise Commissioners*, [1974] AC 133 a case concerning the alleged violation of a patent by unknown importers of the chemical subject to the patent. While first developed in relation to intellectual property, Norwich Pharmacal orders are now granted in relation to other torts, including defamation and breach of contract, as well as alleged criminal offences. More recently Norwich Pharmacal orders are used against Internet hosting services and Internet service providers to identify users which have allegedly engaged in wrongdoing.

In 2011, it was proposed that Norwich Pharmacal orders should not be granted by the UK courts where disclosure of the material in question would cause damage to the public interest.<sup>[3]</sup> This was implemented in the Justice and Security Act 2013

**CRIMINAL REMEDIES:** Criminal remedy includes imprisonment of the infringer and the infringing copies seized. Besides one can get ANTON PILLER order from court, which means that court grants an ex-parte order if it feels that the case is balanced in favour of copyright holder. The owner can claim damages from the infringer. The author can get an order for search of defendant's premises, if there is clear evidence to show the presence of infringing copies in the premises of infringer. The infringer is liable for imprisonment ranging 6 months to 3 years and/or fine of Rs.50,000/- to Rs. 2 lakhs. For the first time, the punishment would be for a period of 6 months to 3 years and/or Rs.25,000 to 2 lakhs and for the second Time it would be for 1 to 3 years and/or Rs.50,000 to 2 lakhs. And for infringement on computer Program, the punishment may vary from 7 days up to 3 years and/or Rs.50,000 – 2 lakhs.

**ADMINISTRATIVE REMEDIES:** An application can be made by the owner of copyright in any work or by his duly authorized agent, to the Registrar of Copyrights to ban the import of infringing copies into India and the delivery of infringing copies of copyrighted article which were earlier confiscated from infringer to the owner of the copyright.

**Copyright Board:** There are no special courts for the purpose of dealing with copyright cases. The regular courts try these cases which basically lack knowledge and expertise in the field of copyright. There is a Copyright Board to adjudicate certain cases pertaining to copyright. The government has set up a Copyright Enforcement Advisory Council (CEAC) to adjudicate certain matters relating to copyright.

**Copyright Society:** A copyright society is a registered collective administration society. Such a society is formed by copyright owners as a group. The minimum membership required for registration of a society is seven. Ordinarily, only one society is registered to do business in respect of the same class of work. A copyright society can issue or grant license in respect of any work in which copyright subsists or in respect of any other right given by the Copyright Act.

#### **Q. Discuss the changes made in the Copyright Law through the Copyright (Amendment Act, 2012).**

The basic expediency behind the enactment of Copyright Amendment Act, 2012 was its pending compliance with the WIPO Copyright Treaty, WIPO Performances and Phonograms Treaty and the changing contemporary adjustments with respect to the utilization of copyright.

**Artistic Works, Cinematographic Films and Sound Recordings:** Definition of 'Cinematograph film' has been amended under Section 2(f) along with the introduction of Clause 2(xxa) i.e. definition of Visual Recording. To overcome digital challenge of creation of multiple copies of a work in different locations, Section 14 has been amended to include the right of storing the work for reproduction of artistic works, a copy of cinematograph films and incorporating sound recordings in any medium by electronic or other means, as was already provided for literary, dramatic and musical works.

**Performers' Rights:** In compliance with the Articles 6 to 10 of WPPT, the Section 38A of the Copyright Act has been introduced with the omission of Section 38 (3) and (4) that paved the way for an exclusive right to a performer and entitling the performers royalties for commercial use. Article 5 of WPPT is reflected in a new section 38B which grants moral rights to performers taking into consideration the editing and alteration done over digital space. Article 9 of WCT influenced the duration of protection of photographic works, extending it to sixty years after the death of the author.

**Copyright Board:** Section 11 states the constitution of Copyright Board consisting of a Chairman and two members. Payment of salaries and allowances has also been included in the statute by introducing it under the Section 11.

**Commercial Rental:** On the lines of Article 11 TRIPS, 7 WCT and 9 of WPPT, the term 'hire' has been replaced by 'commercial rental' under Section 14 (d). Definition of commercial rental has been introduced in section 2(fa) to clarify that the right is not applicable to non-commercial activities. Moreover, under sections 14 (d), the words 'regardless of whether such copy has been sold or given on hire on earlier occasions' has been deleted. This now also incorporates the doctrine of first sale exhaustion in cinematograph films and sound recordings along with literary, dramatic and artistic works before the amendment.



**Assignment of Rights:** To strengthen the position of the author in case of new modes of exploitation, three new provisos has been added under Section 18(1) which provides

(I) no such assignments shall apply to any mode of exploitation that was not in existence when the assignment was made.

(II) The author of a literary or musical work incorporated in a cinematograph film or sound recording shall not assign or waive the right to receive royalties on an equal basis with the assignee in any form other than as a part of the film except to the legal heirs of the author.

(III) The author of a literary or musical work included in sound recording but not forming part of a cinematograph film shall also not assign or waive the right to receive royalties on an equal basis with the assignee in any form other than as a part of the film or sound recording, except to the legal heirs of the author.

Section 19 specifies 'other considerations' apart from royalties for assignment. Under Section 19A The Copyright Board may hold inquiry and pass orders for the recovery of any royalty as it may deem fit. Also, another sub-section 3 has been added in the Section 19A that requires the Copyright Board to pass the order within 6 months from the date of receipt of the complaint. In case the Copyright Board delays in compliance of the same, it shall record the reasons thereof.

**Relinquishment:** Section 21 now authorizes the author to relinquish copyright by way of public notice. Also, sub-section 2A has been introduced under Section 21, wherein the Registrar of Copyrights is required to post the notice for the same on the official website of the Copyright Office within 14 days from the publication of the notice in the official Gazette.

**Compulsory License:** Compulsory Licenses can be obtained for 'any work' and not just 'Indian works' as decided by Board under Section 31. Under Section 31B, special provisions have been added which are related to the work (compulsory license) for disabled.

**Statutory Licenses:** Section 31C provides statutory license to any person who is desirous to make a cover version of a sound recording in respect of any literary, dramatic or musical work. A new section 31D provides for statutory license to broadcasters.

**Copyright Societies:** All copyright societies will have to register afresh under Section 33, 34 and 35 with a limited period of 5 years. Section 33A makes it mandatory for each society to publish its tariff schemes and Section 35(4) prohibits discrimination between authors and owners of rights (royalties).

**Fair Use Provisions:** Section 52 now includes reproduction in the course of judicial proceeding and any work prepared by secretariat of a legislature as not an infringement. Now making of a 3D object from a 2D work (industrial application) shall not constitute infringement under Section 52 (1) (w).

**Special Provision for Access to the Disabled:** The new Clauses (zb) and (zc) added to section 52(1) provide for the right of fair use of the work for the benefit of the disabled, available to any person or organization working for the benefit of the persons with disabilities.

**Border Measures:** Section 53 now provides detailed provisions to control import of infringing copies, disposal of infringing copies and presumption of authorship under civil remedies.

**Against Privacy:** Any person who sidesteps/avoids an efficacious measure for the protection of any of the rights to infringe such rights, shall be punishable with imprisonment, which may extend to two years and shall also be liable to fine as installed under new section 65A, exceptions being national Security and Lawful investigation, While Section 65B provides protection against unauthorized alteration of any right management information by making it a criminal offence punishable with the same sentence as mentioned above.

More detailed deliberations could have been done on:

- i. The 'term of life plus 60 years' clause in case of photographer as it is above the WCT, Berne and TRIPS requirements.
- ii. Issue of criminalization of non-commercial and individual copyright infringement could have been discussed.
- iii. Government Work for the reproduction, communication or publication to public to be considered as non-infringement.
- iv. Duration of copyrights above international obligations.
- v. Copyright exception in case of distance and digital learning.
- vi. Distinction between commercial and non-commercial public communication.
- vii. Intermediary websites between the author/producer and their use should have been given more protection.